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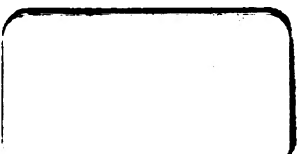
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v.5 .

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of New South Wales,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS,

AND

AN APPENDIX

CONTAINING DECISIONS BY THE JUDICIAL COMMITTEE OF THE PRIVY

COUNCIL ON APPEAL, AND A SELECTION FROM THE FORMER

DECISIONS OF THE SUPREME COURT.

BY

W. H. WILKINSON, Esq., AND J. S. PATERSON, Esq.,

BARRISTERS AT LAW.

VOL. V.

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1867.

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J U D G E S
OF THE
SUPREME COURT OF NEW SOUTH WALES

DURING THE PERIOD CONTAINED IN THIS VOLUME.

SIR ALFRED STEPHEN, Knt., C.B., Chief Justice.
JOHN FLETCHER HARGRAVE, Esq.
ALFRED CHEEKE, Esq.
PETER FAUCETT, Esq.

PRIMARY JUDGE IN EQUITY.
JOHN FLETCHER HARGRAVE, Esq.

ATTORNEY GENERAL.
JAMES MARTIN, Esq.

SOLICITOR GENERAL.
ROBERT MACKINTOSH ISAACS, Esq.

ERRATA.

PAGE 129, in marginal note, line 12, for "present action" read "presentation."

„ 152, in marginal note, last line but one, for "9 G. IV., c. 30, s. 27" read "9 G. IV., c. 31, s. 27."

„ 400, marginal name of case, top of the page, for "Ex parte DESMOND" read "Ex parte SALMON."

TABLE OF CASES

REPORTED IN THE PRESENT VOLUME.

CASES AT LAW.

	PAGE		PAGE
Alexander v. Bensusan.....	314	Kirchner's Trustees, <i>in re</i> ...	346
Armstrong v. Fuller.....	269	Lane v. Taylor	84
Australian Joint Stock Bank v. The Oriental Bank	129	Macdonald v. Murray	55
Baillie, <i>Ex parte</i>	17	McKay, <i>Ex parte</i>	236
Beauchamp v. Waller	1	Maclean v. Dight... ..	95
Brown v. Brown	216	Miller v. Keogh.....	210
Brown v. Waratah Coal Com- pany	238	Monson, <i>Ex parte</i>	256
Buckland's Insolvent Estate, <i>in re</i>	244	Morehead v. McIsaacs ..	295
Charles, <i>Ex parte</i>	108	Municipality of Cook, The v. St. Paul's College.....	322
Cheesbrough v. Thomson... ..	366	Municipality of Waterloo v. Hinchcliffe	273
Clark v. Hart	252	O'Sullivan v. Aarons	336
Cook, Municipality of, The v. St. Paul's College.....	322	" v. "	353
Desmond, <i>Ex parte</i>	387	Palmer v. Whitfield	219
Dooley, <i>Ex parte</i>	343	Prince v. Nowlan.....	304
Fanning v. Simmons	224	" v. "	310
Giblin, <i>Ex parte</i>	260	Pring v. Marina	390
Gibson v. McGeorge	44	Ranclaud v. Cox	347
Gordon v. Bowman	28	Reg. v. Arkon	118
Green, <i>Ex parte</i>	110	Reg. v. Armstrong	36
Green, <i>Ex parte</i>	112	Reg. v. Britcher	121
Harbottle v. Hargraves	104	Reg. v. Burford	115
Hargan v. Kennedy	151	Reg. v. Crookwell.....	119
Hawkins, <i>Ex parte</i>	152	Reg. v. Curtis	340
Hibbuid v. Warden.....	192	Reg. v. Dalrymple	226
Humphery v. Roberts	376	Reg. v. Dawson	33
Ickerson v. Hayes.....	158	Reg. v. Harris	66
		Reg. v. Enoch Hughes.....	13
		Reg. v. Hughes.....	71

CASES AT LAW.—*Continued.*

	PAGE		PAGE
Reg. v. Sam Poo	25	Stockdale v. Hamilton.....	180
Reg. v. Shadforth.....	337	Thurlow v. Scotland.....	316
Reg. v. Shield	213	Tucker v. Duncan	198
Reg. v. Storn	26	Vickery v. Marr	202
Reg. v. Wilson	15	Walmsley, <i>Ex parte</i>	347
Robertson v. Healy	290	Waterloo, Municipality of v.	
Rusden v. Bagnall	40	Hinchcliffe	273
Salmon, <i>Ex parte</i>	397	Williams v. Burley	206
Stenhouse v. Hardie	359		

CASES IN EQUITY.

	PAGE		PAGE
Berry v. Stirling	73	O'Ferrall v. Attorney-General	101
Brooks v. Richardson	3	Shepherd v. Goodey.....	84
Burns v. Long ..	64	Sullivan v. Trust Property Act,	
Frost v. Healey.....	1	1862	20
Gorman v. Jones	92	Wyse v. Heggarty	84
Norton v. Hughes..	23		

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
NEW SOUTH WALES,
AT LAW.

BEAUCHAMP *against* WALLER and another.

1865.

THIS was an action by the payee against the makers of three overdue promissory notes, for £223 15s., £130, and £130 respectively.

Plea, by the defendant *Waller*, that after the making, &c., to wit, on the 17th October, 1863, a deed of assignment under and by virtue of and in conformity with the provisions in that behalf, of the 5 Vic., No. 9, was made between the defendants of the first part, and *A. Robinson*, *W. Love*, and *B. Molineaux* of the second part, and four-fifths in number and value of the creditors of the defendants (not reckoning in number any creditor whose debt was under £50) of the third part; whereby the defendants assigned all their estate and effects whatsoever to the said *A. Robinson*, *W. Love*, and *B. Molineaux*, as trustees for the benefit of all the creditors of the defendants. Averment, that the plaintiff and all other the creditors of the defendants were named in a schedule to the deed with the amount due to the plaintiff,

The 35th sect. of the 5 Vic., No. 9, provides that no deed of assignment shall be valid, unless such deed shall have been executed by not less than four-fifths in number and in value of the creditors of the assignor; but that where any deed shall be so executed, its provisions shall be binding on all creditors named in the schedule, whether assenting or not. *Held*, that in

respect of outstanding bills, the creditor at the time of the execution of the deed is the then holder.

Where the execution of a deed of assignment by A., a creditor of the assignor, was a nullity, it was held that it could not be made good as against B., a non-executing creditor, by a deed of confirmation executed by A., after action brought by B.

1865.
BEAUCHAMP
v.
WALLER
and another.

and to such other creditors respectively, by the defendants; that the deed was duly executed by the said four-fifths of the creditors of the defendants, and by the said trustees, and by the defendants, in the presence of and was attested by a justice of the peace, and notice thereof attested in like manner, and stating truly where such deed was lying for inspection and examination, was, within fourteen days next after such execution, published in the *Government Gazette*, and one other newspaper published in Sydney; that there was unto the said deed annexed a true and particular account of all the property of the defendants, as required by the provisions of the said Act; that by the said deed they the said parties thereto of the third part, on behalf of themselves and all other the creditors of the defendants, and each of them, did acquit, release, and for ever discharge the defendants and their and each of their estate and effects of and from all and all manner of actions, suits, cause, or causes of action and suits, promissory notes, bills, bonds, writs, judgments, obligations, debts, claims, and demands whatsoever, including claims on negotiable instruments not yet due, which the said parties thereto of the third part and all other creditors of the defendants, whether assenting or not, had either separately or jointly with others, or could have, or could claim or demand, against or upon the defendants, or either of them, or for any cause or manner, or at any time up to and inclusive of the date of the said deed of assignment.

The plaintiff replied—first, joining issue on the plea; and secondly, by alleging that the said release was procured by the fraud of the defendant *Waller*. Issue thereon.

The cause came on for trial before *Stephen*, C. J., in May 1865, when it appeared that the action was brought for the purpose of testing the validity of the deed of assignment and release set out in the plea of the defendant *Waller*. The deed was shown to have been executed by the trustees and defendants on the day stated in the plea, and attested; and its attestation published as provided by the statute. The first schedule

annexed to the deed contained a true statement of all the last known holders of every bill or promissory note, or cheque of the defendants, on which their names appeared, whether such instruments were overdue or current. Another schedule contained a list of all to whom the defendants were indebted, holding no security by bill or otherwise. Another schedule contained a list of all the creditors holding securities by way of lien or mortgage. It also contained, as the defendant *Waller* swore, a true and full account of all the defendants' assets, as far as the defendants remembered them. The question whether the deed had been executed by four-fifths in number and value of the creditors of the defendants, depended upon whether the execution by the Bank of New South Wales under the circumstances was valid; and also whether certain persons were to be considered creditors in respect to certain bills and promissory notes, of which they were the payees (known as trade bills), which, at the time of the assignment, were under discount at the Bank, and which were afterwards retired by the payees.

With regard to the execution by the Bank of New South Wales, it appeared that *Waller* had taken the deed to the Bank of New South Wales, where he saw *Gilchrist* the attesting witness, who was the Secretary of the Bank. He went with it to the Board-room, where Mr. *Buckland* was, and Mr. *Woodhouse*, the general manager. Shortly afterwards *Gilchrist* came out with the signatures of *Buckland* and *Woodhouse*. On this evidence his Honor ruled that no release or execution by the Bank was shown; as it was not disputed that there was a corporate seal, and there was nothing to show what authorised *Woodhouse* to put his signature to the seal then appearing as his, or opposite to his signature.

On a subsequent day of the trial a deed of confirmation by the Bank, dated the previous day, adopting the signature of *Woodhouse* to the assignment, was tendered. It was contended, in favour of its admissibility, that the ratification had effect retro-actively; that the Bank had power by statute to authorise the

1865.

BEAUCHAMP

V.

WALLER
and another.

1865.

BEAUCHAMP

v.

WALLER
and another.

execution by agent under his own seal; and that the creditors might all come in at any time, by the words of the 35th section, "where any deed shall be so executed as last named." His Honor ruled that the execution of the assignment was after all merely an informal execution by *Woodhouse*, whom the Bank had at the time power to authorise, and that the ratification afterwards legalized the original execution.

Another creditor was the Colonial Sugar Company. The signature in question was as follows—"On behalf of the Colonial Sugar Refining Co. *J. G. Ross*, Manager." The evidence as to the execution by them was that *Ross*, the manager and a member of the Company, executed it by the authority of the Chairman of the Board of Directors; and that at the next meeting of the Board he reported what he had done, and the Board approved of it. He said, indeed, that the Directors were aware of the arrangement before he signed the deed. The Company was a private Company, trading under a deed of settlement; the affairs of the Company being managed by a board of directors; but it being provided, however, that the Directors might authorise any person to execute deeds for the Company. His Honor intimated that he should reserve the point as to the sufficiency of the execution, but that he was prepared to tell the jury that the Sugar Company had executed this deed, if not by their board, yet by the execution of Mr. *Ross* as an individual member.

On the other point it appeared, for instance, by one of the schedules that Messrs. *Gilchrist, Watt and Co.*, were creditors for three promissory notes; one due September 5th, for £323 14s. 6d.; another due November 7th, for £308 10s. 7d.; and a third due December 12th, for £180. These notes had been discounted at one of the Banks. Messrs. *Gilchrist, Watt and Co.* executed the deed of assignment; but the Bank where these notes were discounted did not execute. At the time of the assignment the first of these promissory notes had been dishonoured and retired by Messrs. *Gilchrist, Watt and Co.*, and therefore they were creditors of the

defendants for only about £360 at that time. But after having executed the deed, the other two promissory notes came to maturity, and were taken up and paid by Messrs. *Gilchrist, Watt and Co.* It was contended that in such case Messrs. *Gilchrist, Watt and Co.* ought to be deemed creditors, not only for the £360, but also for the £308 10s. 7d. and the £190; and that, therefore, the two latter amounts ought to be included in the value of the executing creditors. It was argued that they might release as creditors in respect of those debts, which were only suspended by the giving of these instruments. His Honor, however, was of opinion that the creditor at the time of the execution is the one to be regarded; and that in such case, where the bills, &c., had been discounted by the Bank, the latter holding the instrument was the creditor.

1865.
BEAUCHAMP
v.
WALLER
and another.

On the issue of fraud, his Honor admitted, after objection taken, evidence of conversations between *Waller* and creditors who had not executed the deed of assignment—there being nothing to show that such conversations had been communicated to creditors who had executed the deed.

His Honor directed the jury that the “creditors” meant by the Act, are those to whom the debtor owed the money at the time of his assignment; and that, therefore, the holders of the defendants’ acceptances were their creditors, not the payees of those bills, although they may have taken them for goods supplied to the defendants. On the second issue his Honor directed the jury that mere exaggeration in representation as to value or the like, or high coloring as to expectations, if only in a general way, without any specific and known misstatements, would not be such fraud as would avoid a deed of this kind. But if the defendant represented to any creditor as a *fact*, and not as mere matter of opinion, anything which induced that creditor to execute, such representation being false to the defendant’s knowledge, the deed would be void as to that creditor, but not void as to others on whom no such falsehood operated, or to whom none such was told;

1865.
BEAUCHAMP
v.
WALLER
and another.

referring to *Cooling v. Noyes* (a), and *Reay v. Richardson* (b). He also ruled that no mere error or omission from the schedules annexed to the deed would prevent its operating under the 35th section.

The jury having found for the plaintiff on both issues,

June 13.

Martin, Q. C. (c), now moved for rule *nisi* for a new trial. It is submitted that the learned Judge was wrong in excluding from the list of executing creditors, or rather of the debts due to them, all debts not then due, but with respect to which there were acceptances outstanding of the defendant, which latter were taken up by the indorser. As for instance, Messrs. *Gilchrist, Watt and Co.* were creditors for £498 10s. 7d., for which they took bills. These bills were indorsed to the Bank, and held by the Bank at the time of the release. The bills were inserted in the schedule as having been then held by persons unknown. Messrs. *Gilchrist, Watt and Co.* executed the deed which gave to the defendants a general release from all claims and demands whatever; *Bissett v. Burgess* (d). It is contended that the *ex post facto* payment having revived the original debt, the release by Messrs. *Gilchrist, Watt and Co.* operated with respect to both claims. He also moved for a rule on account of the improper reception in evidence of conversations between *Waller* and non-executing creditors, there being nothing to show that such conversations had been communicated to creditors who did execute the assignment, and also on the ground of misdirection on the issue of fraud, and also that the finding on that issue was against evidence.

STEPHEN, C. J. We will grant a rule on the ground—
(1) (e) that the evidence of conversations before referred to was improperly received; and (2), that the creditors who executed the deed should have been estimated, not only in respect of the bills, &c., which they held at the

(a) 6 T. R. 263.

(b) 2 C. M. & R. 422; see 2 Spence 358; and *Higgins v. Pitt*, 4 Exch. 312.

(c) Before *Stephen*, C. J., and *Wise*, J.

(d) 23 Beav. 278; 26 L. J. Ch. 697.

(e) The arguments on this point have been omitted, there having been no decision thereon.

time of such execution, but of others which they took up. But I am of opinion that there was no misdirection. A misrepresentation false to the knowledge of the person making it would vitiate the deed as to the signature of any person who was seduced by such misrepresentation into signing it. On the other point there was some evidence for the jury, and therefore we cannot interfere with their decision. I give no opinion on the question of fraud, although I myself doubt whether any person was induced by the representations made by *Waller* to execute this deed.

1865.
BEAUCHAMP
v.
WALLER
and another.

WISE, J. It may be a question whether fraud on one creditor might not altogether invalidate the deed. There is no decision on this point, and it is still open for discussion whether, in the case of one signature having been obtained by fraud, the deed is not wholly vitiated.

Sir *W. Manning*, Q. C., and *Darley* showed cause. It is submitted that it is open to the plaintiff to support the verdict, by showing that although some of the names of the assenting creditors which were rejected by the Judge at the trial ought to have been admitted, and the amounts of their claims included in the calculations, yet a larger number of names were received which ought to have been rejected.

Sept. 11 (a).

Martin, Q. C., contra, referred to *Cameron v. Hay* (b) and cases therein cited, and to *Black v. Jones* (c).

Per Curiam. We think that this fact will not disentitle the defendant to a new trial, if the direction of the Judge was wrong, or the evidence objected to by the defendant was wrongly received, unless the counsel for the plaintiff can demonstrate (that is, without drawing inferences merely, or assuming any debateable matter of fact) that the verdict was right notwithstanding.

Sir *W. Manning*, Q. C. It is submitted that the Bank of New South Wales, which held defendants' bills to

(a) Before *Stephen*, C. J., *Hargrave*, J., and *Cheeke*, J.
(b) 1 Sup. Ct. R., App. 9. (c) 6 Exch. 213.

1865.
 BEAUCHAMP
 v.
 WALLER
 and another.

nearly £14,000, ought not to have been received as an assenting creditor. For the release produced was altogether invalid. The 24th section of the Bank of New South Wales Act (*a*) enacts, "that the directors present at a board of directors of the said corporation shall have power to use the common seal of the said corporation for the affairs and concerns of the said corporation, and under such seal to authorise and empower any person without such seal to execute any deeds, &c." There was no proof of there having been any board, or that Mr. *Woodhouse* was authorised as here provided. The execution by *Woodhouse* for the Bank was, therefore, a mere nullity, and could not be ratified—at all events as against third parties. The deed of confirmation could only operate from the time of its execution. How could it affect rights obtained under a deed executed two years before? As between the Bank and the defendant the deed might operate as an estoppel; but it cannot affect the rights of the plaintiff. *Story* says (*b*), "In many cases the subsequent ratification of an unauthorised act, such, for instance, as a demand, or notice, or claim of an unauthorised agent will avail to bind the principal, as well as to confer rights on him. But this is true, only when the act is beneficial to the principal, and does not create an immediate duty on another party to do some other act, or does not subject the latter to some loss, damage, or injury; for then, if permitted, it would have a retro-active effect to defeat or control pre-existing rights, or to found duties, a compliance with which was not obligatory, or even justifiable, at the time, and, of course, which the law will not be so unreasonable as to encourage or establish." The same is laid down in the 246th section. The case of *Donnelly v. Popham* (*c*) was decided on this principle. In that case it appeared that there were two forms for the appointment of a commodore; one directing the officer to hoist a broad pendant; the other to hoist a broad pendant and to have a captain under him. By a proclamation, commodores

(*a*) 14 Vic.

(*b*) *Story's Agency*, s. 440.

(*c*) 1 Taunt. 1.

- with captains under them were to rank as flag officers in the distribution of prize money. The Court held, first, that a commodore who appointed a captain under him, without having authority for that purpose, was not entitled to share as a flag officer; and also that the subsequent ratification of such appointment by the Lords of the Admiralty, or the King in Council, could not have a retrospective effect so as to entitle him to share as a flag officer in any prizes taken before the date of such ratification. He also referred to *Smith's Mercantile Law*(a), and *Broom's Maxims*(b). There can be no retro-active operation to prejudice a stranger. It is also clear that when the plaintiff commenced this action, there was no release executed by the Bank, and, therefore, that the deed could only operate as against him from the day of the confirmation of it by the Board—if at all. But it is submitted that the execution for the Bank was wholly void, and could not be ratified. The execution is as follows:—“For the Bank of New South Wales. *R. Woodhouse*, General Manager.” It is not executed in the name of the Bank, and the Bank could only ratify what had been executed as their deed; *Shep. Touch.* (c) The seal never can become the seal of, or the delivery the delivery for, the Bank of New South Wales; *Taylor on Evidence* (d), *Story on Agency* (e). Their statute requires a corporate seal, and the corporation can only have one. A void estate cannot be made good; *Cr. Dig.* (f), *Shep. Touch* (g). He also referred to *Doe v. Walters* (h), and the notes to *Armory v. Delamirie* (i). On the question whether Messrs. *Gilchrist, Watt and Co.* can be reckoned with respect to promissory notes held then by the bank, *Levy v. Horne* (k), is clear on this point in favour of the plaintiff. In that case it was held that the person to whom a bill of exchange had been transferred or indorsed after the time when a petition in bankruptcy had been presented, could not be considered as a creditor of the acceptor of such bill at the time when the petition was presented; and *Valpy v.*

1865.

BEAUCHAMP
v.
WALLER
and another.

(a) p. 160. (b) 333. (c) p. 57. (d) s. 128.
(e) s. 149. (f) 4 Vol. 83. (g) 311.
(h) 10 B. & C. 626. (i) 1 Sm. L. C. 307. (k) 5 Exch. 257.

1865.
 BEAUCHAMP
 v.
 WALLER
 and another.

Oakeley (a), relied on by the other side, is the same way. These cases show that while bills given for and on account of a debt are current, they are payment; but when overdue, the suspension of the right of action for the original debt is at an end, and the holder again becomes a creditor.

Even if the evidence of the conversations was wrongly received, the Court will not send the case to a new trial; *Cameron v. Hay* (b). [Stephen, C. J. But it went to the credit of the witness].

Martin, Q. C., contra. The decisions on the Imperial Bankruptcy Act of 1861 (c), will guide the Court as to the meaning of the word creditors. In the recent case of *Balden v. Pell* (d) it was assumed that those who had taken bills, or other negotiable instruments for debts due to them, were creditors. *Blackburn*, J., says, "a creditor who has received a negotiable security on account of his debt stands in a peculiar position," which was considered in *Belshaw v. Bush* (e). His right to sue for the debt is not gone, but suspended till the bill attains its maturity; if the bill is then dishonoured in his hands, or if having been passed away by him it comes back to him, he is remitted to his old debt. If the bill is satisfied, he is paid, but till then he is a creditor, though his right to sue is suspended; and as *Shee*, J., says in the same case, "there is also a second class of creditors with bills outstanding, whose debts are suspended, but revive if the bills be not taken up;" *Woods v. Foote* (f), *Nicholson v. Potts* (g). If other persons than the then holders of the bills be counted in the defendants' favour, that is, as having executed, then there will be more than four-fifths; or if there are not that number at this moment, there may be four-fifths obtained before the next trial. As to the execution by the Bank of New South Wales, the execution in the first instance so bound the Bank that they

(a) 16 Q. B. 949; see *Price v. Price*, 16 M. & W. 239.

(b) 1 Sup. Ct. R., App. 9.

(c) 24 & 25 Vic., c. 134.

(d) 33 L. J. Q. B. 200.

(e) 11 C. B. 191.

(f) 1 H. & C. 841; 32 L. J. Ex. 199.

(g) 10 L. T. N. S. 192.

could not afterwards appear in the list of creditors. The fact of ratification is not touched by any question as to the rights of third persons. The authorities do not apply to a case like this. If, however, there ought to have been a plea of *plus darrein continuance*, a new trial should be granted to enable us to plead it. For the learned Judge held at the trial that we need not plead such a plea.

1865.
BEAUCHAMP
V.
WALLER
and another.

Cur. adv. vult.

STEPHEN, C. J., now delivered judgment in this case November 27.
as follows :—

The jury in this case found both the main issues for the plaintiff ; that is to say, that the deed of assignment and release was not executed, as the statute requires, by four-fifths of the then existing creditors, and that—even if so executed—it was procured by fraudulent representations as to matters of fact, and therefore was inoperative as to the creditors imposed upon. So that, if either of these findings be sustained, the result will equally be fatal to the defendant. With respect to the latter, Mr. Justice *Hargrave* conceives that there is no ground to doubt the correctness of the finding ; and we are agreed, as the Court was when it refused a rule on this point, that the verdict could not be disturbed on the question of fraud, whatever might be our impressions as to its propriety. But Mr. Justice *Cheeke* and myself think it due to the defendants to say, that we do not concur in the finding on that issue. The question, however, whether the deed was executed by the requisite proportion of creditors, in value as well as in number, appears to us all to have been rightly answered in the negative ; and the rule for a new trial, consequently, must be discharged.

In the first place, we are of opinion—having regard especially to the proviso in section 83 of the Act—that, in respect of outstanding bills, the “ creditor ” at the time of the execution of the deed is the then holder. It follows, that the original payees and indorsers of all such bills, executing that deed, were rightly excluded from

1865.

BEAUCHAMP
v.
WALLER
and another.

the computation, as creditors in respect of them. It was contended that, inasmuch as those bills (in the case of Mr. *Gilchrist*, for instance), had been given in payment for goods, the original debt was not extinguished by those instalments, nor by the indorsement and discounting of them, but suspended only; and that it revived, immediately on the taking up of the bills. We think, however, that if so, the creditor should at all events be shown to have executed the deed, in every such case, in respect of his original debt; or to have re-executed the deed after revival of the debt. At the moment of execution, in all the instances of outstanding bills excluded by me, the person signing had no claim in respect of that debt, and none in respect of the discounted bill or bills—other than the contingent one. The banks by which these bills were then held, however, were at the time treated and dealt with as the creditors in respect of them.

But, secondly, we are of opinion that the claim of the Bank of New South Wales (the amount of which exceeds that of the debts supposed to have been wrongly excluded), ought not to be computed among the debts due to assenting creditors. For, assuming that the instrument executed by Mr. *Woodhouse*, or at any rate the deed of confirmation executed pending the trial, would be amply operative against the Bank itself, the former instrument alone was simply no deed of the Bank; nor did the seal or signature to it purport to be that of the Bank. The deed could not, therefore, we think, be efficaciously ratified or confirmed—as against a third party, a stranger, to his prejudice, so as to defeat a right otherwise vested and still remaining in him. On the other hand, if the last deed—the only one executed by the Bank—be regarded merely as a release then for the first time operating, it could only have been pleaded in bar of the action from that date; and we are not prepared to say, as the case then stood, what would have been the effect of such a plea. But we need give no opinion on that point.

The conclusion thus arrived at by us, respecting the

non-execution of the deed by creditors representing four-fifths of the debts, renders it unnecessary to decide the questions which relate to the other issue ; namely, the alleged improper reception of evidence as to conversations with non-executing creditors, and conversations affecting another deed or arrangement—not the one now in question. We are not agreed, as to the admission of that evidence. But, even if it be conceded that no part of these conversations should have been admitted, we are all of opinion that a new trial ought not to be granted, as to that issue. For, having reference to the charge—which on that point was delivered in writing, and in terms too explicit to be mistaken—the jury were instructed to regard such representations, only, as were made or communicated to, and operated on the mind of, some executing creditors or creditor. We cannot infer, therefore, that the conversations objected to influenced, in any degree, the verdict on that issue.

Rule discharged.

1865.

BEAUCHAMP
v.
WALLER
and another.

THE QUEEN *against* ENOCH HUGHES (a).

December 22.

SPECIAL case reserved for the opinion of the Court, under the 18 Vic., No. 8.

The prisoner was tried and convicted before *Cheeke, J.*, upon an information for perjury, committed in an examination taken before the Registrar in insolvency.

It appeared that a memorandum in writing, headed "Meetings of Creditors on" such a day, and in which paper the meeting in *Enoch Hughes'* estate was mentioned as the "second meeting," and having the following words written in the margin thereof, "to be taken by the Registrar in insolvency," and which words were initialled by the Chief Commissioner, was offered in

A memorandum in writing, headed "Meetings of Creditors" on, &c., and in which paper the meeting in E. H.'s estate is mentioned as the second meeting, and having the following words written in the margin thereof, "to be taken by the Registrar in insolvency,"

such words being initialled by the Chief Commissioner is a good appointment and order by the Commissioner to the Registrar to hold meetings of creditors for the proof of debts in E. H.'s estate, under the 9th section of the 25 Vic., No. 8.

The Registrar having this power has power to take evidence, both orally and by affidavit, for the purposes of such proof.

(a) Before *Stephen, C. J., Cheeke, J., and Faucett, J.*

1865.

The QUEEN
v.
HUGHES.

evidence as proof of the Registrar's appointment from the Chief Commissioner of the Insolvent Court, to hold meetings of creditors for the proof of debts, under the ninth section of the 25 Vic., No. 8, and to hold the meeting in *Enoch Hughes'* estate, at which the deposition in question was proved to have been made.

Mr. *Darley*, who appeared for the defendant, objected to the sufficiency of this evidence, and also that the Registrar had no power to administer an oath at the meeting in question.

The questions reserved for the opinion of the Court were, whether the evidence was sufficient; and whether the Registrar had authority to administer an oath.

Darley for the prisoner.

Butler for the prosecution.

STEPHEN, C. J. We are all of opinion—first, that a memorandum in writing by the Chief Commissioner, only initialled by him in the following words, “to be taken by the Registrar in insolvency,” in the margin of a paper headed “Meetings of Creditors” on such a day, and in which paper the meeting in *Enoch Hughes'* estate is mentioned as the “second meeting,” is a good appointment and order, within the ninth section of the new Insolvent Act, for the holding of such second meeting, and, therefore, necessarily and unavoidably for the “proofs of debts” thereat. Since the Insolvent Act makes the holding of a second meeting imperative, and enacts that it shall be for the proof of debts, it would be absurd to decide, therefore, that the Chief Commissioner authorised the Registrar merely to hold the meeting, and yet did not authorise him to take any proof of debts there. And, moreover, in case of no such proof being then and there taken, what would there be for the Chief Commissioner to review?

We are of opinion, secondly, that the Registrar having this power, has necessarily and independently of the eleventh section of the Acts Shortening Act, the power to take evidence, orally or by affidavit, for the purposes of such proof.

The oath of the insolvent, therefore,—the defendant in this case,—was taken before a lawful authority, and the conviction will not be disturbed.

1865.
—
The QUEEN
v.
HUGHES.

Conviction sustained.

THE QUEEN *against* WILSON.

December 5.

SPECIAL case reserved for the consideration of the Judges, under the 13 Vic., No. 8.

“The prisoner was in the employment of *Charles Harrison*, postmaster at Braidwood. Several money letters having been stolen, *Harrison* suspected *Wilson* to be the thief. He laid a snare and caught him; that is to say, he (*Harrison*) marked a one pound note and enclosed it in an envelope, addressed by him to a fictitious address, and having put a stamp on it put it into the letter box. On making up the day's mails the letter was missing. A policeman was sent for. *Wilson* was searched, and one pound was found on him.

The prisoner was charged with stealing a one pound note, the property of C. H. The note was taken with a letter in which it had been put by C. H. from the Braidwood post office, where C. H. was the postmaster. But C. H. deposed that he placed the note and letter in the box for the purpose only of testing the honesty of the prisoner, and that the address of the letter was wholly fictitious. He added, that it was not his intention to send the letter. *Held*, the property in the note was rightly laid in C. H.

“*Wilson* was indicted, under 15 Vic., No. 12, s. 48, for that he did feloniously and fraudulently take from the possession of the postmaster at Braidwood, in the colony aforesaid, one post letter, the property of the Postmaster-General of the said colony.

“The trial took place before me, at Braidwood, on the thirtieth day of October last. The prisoner was defended by Mr. *Dalley*, instructed by Mr. *Scarvell*.

“The foregoing statement was proved, and the prosecutor (*Harrison*) said, on cross-examination, ‘my intention was to test the boy's honesty. I might have let the letter go. I can't say whether I intended to take out the letter. I put the twopenny stamp on.’

“Mr. *Dalley* objected that as the letter was not proved to have been ‘sent,’ or that it was ‘to be sent by the post,’ the taking of it by the prisoner was not an offence under the Act.

“I sustained the objection, and directed the jury that if they thought the letter was not intended *to be sent* by

1865.
 The QUEEN
 v.
 WILSON.

post, they ought to acquit the prisoner. He was acquitted accordingly.

"On the following day the prisoner was indicted and tried for stealing money to the amount of one pound, the property of *Charles Harrison*.

"The prisoner was defended by Mr. *Scarvell*.

"The same evidence was again gone through; and on this occasion the postmaster swore, in answer to a question by the Crown Prosecutor, 'I did not intend the letter to go.'

"Mr. *Scarvell* objected that this was a post letter, and that the property ought to have been described as the property of the Postmaster-General, and not of *Charles Harrison*. I reminded him of my ruling yesterday, and I overruled the objection, and told the jury to the effect that, if this letter had been addressed, and intended to be sent to a person in existence, it would have been a post letter, and that the property would have passed from the sender; but that as *Harrison* said the address, 'Mrs. *Pelican*, 52 Clarence-street, Sydney, for Mrs. *Ambrose*,' was a fictitious one, and that it was not intended to be sent, that it was not a post letter, and that the property in it and its contents remained in *Harrison* just as much as if he had merely put it in a tea caddy on any part of his own premises.

"The prisoner was found guilty.

"The question for the Supreme Court is whether my ruling was correct.

F. W. MEYNOTT, Judge."

December 1, 1865.

Isaacs for the prisoner.

Counsel for the Crown were not called on.

STEPHEN, C. J. The prisoner was convicted of larceny in stealing a one pound note, the property of *Charles Harrison*. It was taken together with a letter in which it had been put by *Charles Harrison*, from the Braidwood post office. The prisoner was a servant in that office, and *Charles Harrison* was the post master. But

Charles Harrison swore that he placed the note and letter in the box for the purpose only of testing the honesty of the prisoner ; and that the address of the letter was wholly fictitious, there being no such person. He added, that it was not his intention to send the letter, his only object being that which he stated. The question was whether the property in the note was rightly laid in *Charles Harrison*.

1865.
The QUEEN
v.
WILSON.

I am clearly of opinion that the property was rightly so laid. The letter was not, it seems to me, under the circumstances a "post letter." But even assuming that it were a post letter, the decision of this Court in *Cum Fatt's Case* (a) is an authority that the property cannot be laid in the Postmaster-General. If that be so, whose property did this note continue to be ? It was either that of *Charles Harrison* as an individual (whether he be considered as bailor or bailee), or of the same *Charles Harrison* as postmaster. Taken either way, the property is rightly laid. I am inclined to think that it remained throughout in *Charles Harrison*, in his personal and not in his official character ; but it is immaterial to consider which.

CHEEKE, J., and FAUCETT, J., concurred.

Conviction sustained.

Ex parte BAILLIE.

THIS was an application to set aside an order of *Wise, J.*, dismissing an application for a prohibition to restrain the District Court of Armidale from further proceeding in an action in which the applicant was the defendant. It appeared that the defendant was a contractor for building a bridge at Armidale, and the plaintiff in the action in question was one of his work-

The decision of a Judge in Chambers upon a rule granted by the Court, but made returnable in Chambers, is subject to be reviewed by the Court.

The defendant was a contractor for building a bridge at A., where he had slept for three or four months ; but he ordinarily lived in S. *Held*, that he was not resident at A. within the meaning of the fourth section of the District Courts Act.

(a) 1 Sup. Ct. R., C. L. 239.

1865.

Ex parte
BAILLIE.

men. The defendant ordinarily lived in Sydney, but had resided or lodged in Armidale for three or four months. It was sworn that he had slept there from the 1st November, 1864, to the 12th February, 1865, and during ten days in October, 1864. The action was brought on the 5th of February, 1865, and the summons was served at *Baillie's* office the same day. There was nothing on the face of the plaint to show that the defendant lived out of the jurisdiction. When the case was called on, an affidavit made by *Baillie* and sent by him by post to the Registrar was handed by the latter to the District Court Judge. In this affidavit the defendant swore that he did not reside within the jurisdiction, but that he resided at Sydney, and had resided there for two years. It also appeared that the plaintiff corresponded with the defendant there. In answer to this, the plaintiff was called as a witness, and swore that the defendant had resided some months at Armidale; and upon this the Judge gave a verdict for the plaintiff.

The rule in this case was made returnable, originally, before a Judge in Chambers; and it was heard before *Wise, J.*, who discharged the rule with costs, on the ground that evidence had been gone into on the question of residence before the District Court Judge, and that on that evidence the fact was rightly decided (a).

September 1.

Darley, for the respondent (b), objected that the Court could not entertain the application. The case has

(a) The judgment of *Wise, J.*, was in the following terms:—
“When the jurisdiction exists over the subject matter, but the question is as to the jurisdiction over the person, then the higher Courts will not interfere by prohibition, if (the applicant having had notice of the proceeding) they are of opinion that on the evidence before the Court below the Judge came to a right decision. The course open to a defendant, where the Court is without jurisdiction, is twofold. He may on that ground apply to this Court for a prohibition before the case comes on in the District Court, or he may go before the District Court, either actually or by awaiting its decision, for, having notice of its proceedings, whether he appears or not is immaterial. If the District Court Judge, on the facts before him, comes to a conclusion wrong on the facts in the opinion of the Court above, then a prohibition will go; but not so if the Court thinks that on those facts the decision of the District Court Judge is right. And though the Court above may, on the evidence adduced before it, be of opinion that the decision was wrong, yet prohibition will not lie on this ground. My judgment is based on the distinction between a prohibition on the ground of want of jurisdiction as to the subject matter, and one on the ground of the person being without the jurisdiction, which latter is the case here.”

(b) Before *Wise, J.*, *Hargrave, J.*, and *Cheeke, J.*

been decided by Mr. Justice *Wise*, under the authority of a rule granted by the full Court, and returnable in Chambers. He acted as the delegate of the Court, and the adjudication must have the same effect as if it were the adjudication of the full Court, and the Court cannot review his decision. The practice is thus distinctly laid down in Mr. *Lush's* Book of Practice (a). He referred to *Smeeton v. Collier* (b), *Arthur v. Marshall* (c), and *Stokes v. Fussell* (d).

1865.

Ex parte
BAILLIE.

Salamons contra. The applicant has an absolute right to the decision of the full Court. Is he to be deprived of that right, and to be obliged to remain satisfied with the opinion of a single Judge? [*Wise*, J. How would the order be drawn up?] The Court never meant to deprive itself of its appellate jurisdiction. [*Wise*, J. Suppose this rule had been made absolute, would it not have been a singular thing to allow an application to the full Court to set that order aside?] *Teggin v. Langford* (e) was referred to.

Darley replied.

Cur. adv. vult.

The judgment of the Court, on this preliminary September 5. objection, was now delivered by

HARGRAVE, J. In this case Mr. *Salamons* made an application for a prohibition against proceedings in the District Court, by way of appeal against a decision of the Judge at Chambers; but Mr. *Darley* objected that, inasmuch as the Judge at Chambers had entertained the case under the authority of a rule *nisi* granted by the full Court, but returnable in Chambers, no appeal would lie from his decision afterwards, he being in fact the delegate of the full Court for that rule.

In support of this preliminary objection the authority of *Reg. v. the late Sheriff of Lancashire* (f) was cited. That case was as follows:—

(a) 669.

(c) 2 D. & L. 376.

(e) 10 M. & W. 557.

(b) 1 Exch. 457.

(d) 14 C. B. 686.

(f) 4 Jur. O. S. 538.

1865.

 Ex parte
 BAILLIE.

“The Court will not entertain a motion to set aside the order of a Judge at Chambers, made on a rule drawn up to show cause there. In this case a rule *nisi* had been obtained to set aside an attachment, which was drawn up to shew cause before a Judge at Chambers, where the cause came on before *Gurney*, B., who made the rule absolute, desiring the parties however to bring the case before the Court. A rule *nisi* to rescind that rule having been obtained, *Creswell* appeared to shew cause—*Sed per Curiam*.—When a rule is drawn up to shew cause at Chambers, no appeal lies to the Court. Were this not so, the Court would have to rehear every rule drawn up to shew cause there. Rule discharged with costs.”

It was admitted that this was the only direct authority upon the point; and that the case is not cited in any book of practice but Mr. *Lush's* Book of Practice, in which it appears to be adopted doubtfully, being quoted thus:—“It has been said that where a Judge acts as the delegate of the Court in discharging, or making absolute, a rule *nisi* made returnable at Chambers, his decision cannot be revised by the Court.”

The only other authority cited in support of this objection is *Arthur v. Marshall* (a), in which *Pollock*, C.B., when refusing to make a six-day rule returnable either on the last day of term, or at Chambers, is reported to have said, “That would be more objectionable; it would be in effect extending the term.”

Upon these two cases, thus very shortly reported, and scarcely reported at all, Mr. Justice *Cheeke* and myself do not consider ourselves precluded from deciding this objection upon principle. In accordance with general previous decisions, and what we conceive to be the clear law of the Court, a party entitled to the opinion of the full Court cannot be even temporarily deprived of such right, except by his own act or consent, or by the clear words of the Legislature, as for example by the 27th section of the 4 Vic., No. 22. Even, then, however, the party in possession of such order at Chambers is bound

(a) 2 D. & L. 376.

to come to the full Court on the first day of the ensuing term, to obtain an order of confirmation.

1865.

Ex parte
BAILLIE.

We are unable, therefore, to concur in the apparent decision of the Exchequer Court in *Reg. v. Sheriff of Lancashire*, where a party not present, as it seems, at the rule *nisi*, appears to have been held to be bound by the order of the Judge at Chambers, and precluded from appealing. We think that when even the party applying for the rule *nisi* consents to the order being returnable at Chambers, he takes the order, subject to the inherent and general liability to reversal by the full Court, precisely on the same grounds as in any other case considered at Chambers.

The general grounds for such right of appeal from Chambers are thus stated in *Peterson v. Davis (a)*, when *Wilde*, C. J., in granting an application after refusal of two similar applications at Chambers for the same object, held that the Court might entertain such applications upon affidavits of new and material facts. That Chief Justice said, "considering the vast quantity of business at Chambers, and that there is not time there for very deliberate judgment, it would be very inconvenient if parties were to be concluded by the Judge's decision there; and it would be a hardship if such decision could not be reviewed, or a fresh application be made upon additional facts."

We apprehend that all the numerous cases where the full Court has refused to entertain appeals from Chambers, have possessed other independent grounds for such refusal, such for example as that the subject was a mere discretion in the Judge, not subject to review; and in the case of *Smeeton v. Collier (b)*, we find *Pollock*, C. B., saying, "Where a motion is to be made in open Court in term time, it may be urged that the Legislature contemplated that such authority should be confined to the Court."

The distinctions on which we rely are thus mentioned also in a case of *Outrim v. Bowden (c)*, in this Court, in the following terms:—

(a) 17 L. J. C. P. 290-3. (b) 1 Exch. 457. (c) Steph. Sup. Ct. Pr. 131.

1865.

Ex parte
BAILLIE.

“Renewed Applications.—Reviewing Judge’s Order, *Outtrim v. Bowden*.—13th December, 1847.

“This was an application to the Court, under the 5 Vic., No. 9, s. 18 (now repealed), to refer the accounts between the parties to arbitration. A similar application had been made to a Judge in Chambers, and refused. The Court said, that in cases of this kind the Court and a single Judge had co-ordinate jurisdiction; and the thing to be done depended on the “discretion” of the tribunal applied to. In such a case the party was bound by the decision of the Judge, before whom he had elected to go, and the Court would not review it. In cases where the order applied for was imperative on the tribunal, if certain facts were made out, and the Judge had mistakenly decided those facts, or erroneously held that he was not bound to do the thing required, then the Court may be applied to; for it is still the superior tribunal to correct errors. So, in cases where the Judge acts merely as the delegate or representative of the Court (as in granting rules to plead, &c.), it may and generally will review the Judge’s discretion; though, even there, the Court might decline (as, *e.g.*, in petty matters) to interfere.”

The Chief Justice has been consulted on this preliminary objection; and, I am to add, that his Honor—although, on the authority of the case in the *Jurist*, in the first instance thinking otherwise—concurs in opinion with Mr. Justice *Cheeke* and myself, that the Court does not necessarily, by making a rule returnable in Chambers, deprive the parties of their right to appeal; although he conceives that the party obtaining such a rule might legally be subject to that condition (a).

December 5.

Salamons now in support of the application (b). It is submitted that the decision of Mr. Justice *Wise* was wrong, for as the defendant in the case (the present applicant) never appeared in the District Court, the evidence given in his absence by the plaintiff cannot pre-

(a) It is believed that *Wise*, J., dissented from this judgment.

(b) Before *Stephen*, C. J., *Cheeke*, J., and *Faucett*, J.

clude the application. The irregular sending of an affidavit to the Registrar, for it was sent to him and not to the Judge, cannot be held to amount to the giving of evidence, or to appearing in Court.

1865.
Ex parte
BAILLIE.

But, even if it was so, the decision was wrong. Living for a few weeks at an hotel in Armidale is not a residing there, although he may as a contractor have kept an office and carried on business there. He referred to *Butler v. Ablewhite* (a), *Macdonald v. Paterson* (b), and *Sheils v. Rait* (c). It is submitted that the distinction suggested by Mr. Justice *Wise* as to jurisdiction over the subject matter, and over the person, is not well founded. For the Court interferes by prohibition, on the ground that the proceedings are a contempt. In *in re Foster v. Foster* (d), in which the Court of Queen's Bench refused to grant a prohibition to the Divorce Court upon the application of the co-respondent, on the ground that he was a stranger to that part of the suit which dissolved the marriage, and was aggrieved only in so far as he had been decreed to pay the costs, *Cockburn, C.J.*, says, "I concur in the proposition that although the Court will listen to a stranger, and interfere by prohibition when he points out that some Court has exceeded its jurisdiction, whereby some wrong or public grievance has been sustained, yet, that is not *ex debito justitiæ* a matter upon which this Court may properly exercise its jurisdiction." *Jackson v. Beaumont* (e) is a distinct authority that the writ is of right, and not of course. The applicant was entitled to presume that the Court below would act rightly and decline to proceed without jurisdiction, and ought not to be deprived of the relief he now asks.

Darley showed cause. The defendant lived at Armidale when the summons issued. The affidavit of the defendant also was before the Judge; and it is, therefore, clear that the defendant practically and in effect appeared and raised the objection of non-residence, and that the Judge decided on the balance of testimony against the

(a) 28 L. J. C. P. 292. (b) 11 C. B. 755. (c) 7 C. B. 116.
(d) 10 Jur. N. S. 254. (e) 11 Exch. 300.

1865.

Ex parte
BAILLIE.

defendant. The evidence as to residence was conflicting, and the Court cannot say that the decision of the District Court Judge on that point was wrong. It is submitted that that decision is conclusive. There is nothing on the face of the plaint to show that the defendant was not within the jurisdiction. Where the subject matter is apparently within the jurisdiction, it is for the Judge to decide whether he has jurisdiction or not; and if his decision is wrong, it is a matter for appeal and not for prohibition. He referred to *in re The Skipton Industrial Cooperative Society v. Prince (a)*, and *Thompson v. Ingham (b)*.

Salamons replied.

STEPHEN, C. J. On the whole, I am of opinion that *Baillie* was not a resident in the Armidale district within the meaning of the Act. For he only lived there as he did from time to time at three or four other places, very distant from each other, where he was carrying on contracts temporarily, and for business purposes only. His head office and actual residence with his family was in Sydney. The plaintiff, moreover, knew this, and corresponded with him there. So that if *Baillie* be taken to have appeared in the District Court, and offered evidence (which, though irregular, was certainly received by the Judge) which was there met by other evidence, the Judge was wrong in his conclusion on the evidence.

If a defendant merely appears before the Judge, and takes objection to the jurisdiction of the Court, it is merely as it were to plead in abatement, and that is what occurred here; but if he enters into evidence, and is beaten on the facts, he is concluded by the decision of the Court below.

CHEEKE, J. I think the adjudication of the District Court Judge was arrived at on improper evidence. The affidavit was sent up only as a protest.

FAUCETT, J. The affidavit was, in my opinion, only a mere protest. But, however that may be, the residence of the defendant seems to me clearly to be at Sydney.

Prohibition to issue.

(a) 33 L. J. Q. B. 324.

(b) 14 Q. B. 710.

1865.

THE QUEEN *against* SAM POO (a).

December 1.

SPECIAL case stated under 13 Vic., No. 8.

"This prisoner was found guilty at the Bathurst Circuit Court, October 1865, of the wilful murder of *John Ward*, at Talbragan, on the 3rd February, 1865.

"Among the evidence that the prisoner was the person who inflicted the wound, of which the deceased undoubtedly died, and the principal evidence of the immediate facts of the killing, was the dying declaration of the deceased, duly made and signed by him under the following circumstances.

"The evidence of Mr. *Plunkett* was, that he took down the words of this declaration by the bedside of the deceased, and at his dictation, after he had said he knew he was dying, and had expressed great anxiety as to what would become of his "poor wife and children," and after having requested that the service for the sick contained in the book of Common Prayer, according to the service of the Church of England, might be read to him; which was done by Mr. *Plunkett*, and his family joining in the prayers, including a prayer for a person about to die. Mr. *Plunkett* also proved that deceased had 'desired' a doctor to be sent for 'on the previous day,' and requested that his wife and children might be sent for.

"The declaration was in the following terms:—'I, *John Ward*, senior constable stationed at Coonabarabran, do hereby solemnly declare myself dangerously ill, and at the point of death; that on this 3rd February, 1865, I met two men on the Mudgee side of Barney's Reef, who told me that a Chinaman was about sticking up some people; when I got on the Talbragan side of Barney's Reef, I sighted a Chinaman, and when he saw me he left the road and went into the bush; I chased and overtook him, and told him that I was a policeman, and ordered

Declaration by a man who states his belief that he is dying, and causes prayers for the dying to be read for him, and who is then in fact dangerously ill, is receivable as a dying declaration, although he at the time, or shortly before, had sent for a medical practitioner to attend him.

(a) Before *Stephen*, C. J., *Cheeske*, J., and *Faucett*, J.

1865.

The QUEEN
v.
SAM POO.

him to put down his gun ; he ran at me and said, ' you policeman, me fire ; ' when he presented his gun I got off my horse and took out my revolver ; he followed me round, and fired at and wounded me ; I fired one shot at him and then fell ; I fired two more when I was on the ground ; he then ran away, reloading his gun ; to the best of my belief, the Chinaman was a short, little, cranky old man ; he had a gun and a pistol. '

" Mr. *Innes* (who defended the prisoner at my request) objected that this was not sufficient evidence that the deceased was without hope of living, and actually in extremis.

" I received the declaration subject to the opinion of the full Court.

JOHN F. HARGRAVE."

No counsel appeared for the prisoner.

Per Curiam. We think the evidence was receivable as a dying declaration, and that, therefore, the conviction must be sustained.

Conviction sustained.

December 1.

THE QUEEN *against* JAMES STORN (*a*).

A tent, which is the ordinary sleeping place of the prosecutor and his family, and in which (in fact) he and they lived for many months, up to within a few days of the arson, is a dwelling-house for the purposes of arson.

SPECIAL case under 13 Vic., No. 8.

" This prisoner was found guilty at the Bathurst Circuit Court, October 1865, of feloniously, unlawfully, and maliciously setting fire to a certain dwelling-house of *Thomas Kennedy*, situate in Lithgow Valley.

" The premises burnt consisted of a calico tent, about twenty feet long by nine feet wide, which had been usually occupied by Mr. *Kennedy*, and had been constructed for the residence of himself and his wife and two young children, one four years old and the other an infant in arms, when they were with Mr. *Kennedy* during his surveys for the railway works. The tent contained at the date of the fire, bedstead and bedding, and surveying

(*a*) Before *Stephen*, C. J., *Cheeke*, J., and *Faucett*, J.

instruments—the latter valued at two hundred pounds. Mr. *Kennedy* and his family had always slept there, dined there, and occasionally entertained their friends there, for a period of twelve months, except two or three days, up to within three or four weeks of the fire. At the date of the fire no one was sleeping there, but a person in an adjoining tent had charge of the tent and its contents. Mr. *Kennedy* has for eight or nine years had a residence at Parramatta, where Mrs. *Kennedy* has usually resided, when not with her husband in the tent.

1865.
The QUEEN
v.
JAMES STORN.

“Mr. *Innes* objected that this tent was not a ‘dwelling-house.’

“But on the authority of *England’s* case (a), and other authorities, I ruled that it was a dwelling-house, being permanently and principally used for the purposes of habitation.

JOHN F. HARGRAVE.”

Butler, for the Crown, referred to *Smith’s* case (b), where a permanent building of mud and brick on the Down at Weyhill, which was only used as a booth for the purposes of the fair for a few days in the year, had wooden doors and windows bolted inside, and which the prosecutor rented for the week of the fair, and where he and his wife slept every night of the fair, during one night of which the offence was committed, was held to be a sufficient house for the purpose of burglary.

No counsel appeared for the prisoner.

STEPHEN, C. J. The point is not whether this structure can be considered a dwelling-house for the purposes of burglary—although, I believe, there is a decision of this Court on that point in the affirmative—but whether it is a dwelling-house for the purposes of arson; and we are all of opinion that it is, and that the conviction must be sustained.

Conviction sustained.

(a) *Roscoe*, p. 269.

(b) 1 M. & Rob., 256.

1865.

December 21.

GORDON and another *against* BOWMAN (a).

An instrument
in the follow-
ing words :

"At sight pay
W. B., or
bearer, the sum
of £42 10s., for
value received.
(Signed), T. E.
Payable at the
residence of
T. H. S.,
Church-street,
Mudgee,"
Held to be a
bill of ex-
change.

THE first count of the declaration stated that *T. E. Ellis* on the 3rd September, 1863, made his cheque or order in writing for the payment of money directed to *T. H. Linden*, and required him to pay to the defendant or bearer £42 10s., and the defendant endorsed the cheque to the plaintiff. Averment of presentment and dishonour whereof the defendant had notice and did not pay the same. The second count was on an overdue promissory note for £42 10s., made by *T. E. Ellis*, on the 3rd September, 1863, and endorsed by the defendant to the plaintiff. Averment of presentment and dishonour whereof the defendant had notice and did not pay the same. The third count was in the same terms as the second, but stating that the promissory note was payable at the residence of *T. H. Linden*, Church-street, Mudgee.

The fourth count alleged that *T. E. Ellis*, on the 3rd September, 1863, by his bill of exchange now overdue, directed to Mr. *Linden*, required *Linden* to pay to the defendant or bearer £42 10s. at sight, and the defendant endorsed the said bill to the plaintiffs, and the plaintiffs made diligent search and inquiry for the said *T. H. Linden* in order to present the said bill to him for acceptance, but the said *T. H. Linden* could not be found, nor could his place of abode be discovered, and the defendant had due notice of the premises, but did not pay the said bill.

Plea to the first, second, third, and fourth counts that the cheque or order in the first count mentioned, and that the promissory note in the second and third counts mentioned, and that the bill of exchange in the fourth count mentioned were, and are, one and the same

(a) Before *Stephen*, C. J., *Checke*, J., and *Faucett*, J.

instrument, which said instrument was, and is, in the words and figures following, that is to say :

September 3rd, 1863.

£42 10s. sterling.

At sight pay Mr. *William Bowman* or bearer the sum of Forty-two pounds ten shillings sterling, value received.

THOS. EYRE ELLIS.

Payable at the residence of *Thomas Henry Linden, Esq.*, Church-street, Mudgee.

and on the back of the said instrument are endorsed the words following, that is to say—

WILLIAM BOWMAN,
his
mark,
A. GORDON.

Presented at Mr. *Linden's* house, Mudgee, no one at present residing there, 28th January, 1864.

S. R. MILLS.

Demurrer and joinder.

Salamons in support of the demurrer. The legal effect of the document set out in the plea is correctly stated in those portions of the declaration to which it is pleaded. The question is whether an instrument in this form be a cheque, a promissory note, or a bill of exchange, or neither. It is declared in the first count as a cheque, in the second and third as a promissory note, and in the fourth as a bill of exchange. The plea simply sets out the instrument. It is submitted that it is a bill of exchange; and also a promissory note. Where a party issues an instrument in such a way that it is ambiguous whether it be a bill of exchange or a promissory note, the party holding it is entitled to treat it as either the one or the other; *Edis v. Bury* (a). For if there is any ambiguity or uncertainty in the terms of the instrument, the Court will so construe it as to give effect to the presumed intention of the parties. For this reason an instrument in the common form of a bill of exchange, except that the word "at" was substituted in very small letters for "to" in the address of a bill before the name of the drawee, was held to be a bill of exchange; *Shuttleworth v. Stephens* (b); and the same decision was arrived at where words

1865.

GORDON
and another
v.
BOWMAN.

(a) 6 B. & C. 433.

(b) 1 Camp. 407.

1865.

GORDON
and another
v.
BOWMAN.

had been introduced into a bill for the purpose of deception, which might in strictness make it a promissory note; *Allen v. Mawson* (a). If a person draw a bill of exchange on himself, it may be declared on as a promissory note; *Miller v. Thompson* (b). In such case there is an absence of the circumstance of there being two distinct parties as drawer and drawee, which is essential to the constitution of a bill of exchange. *Gray v. Milner* (c) is a distinct authority that a bill addressed, not to a particular person, but merely to a particular house, is sufficiently certain, at least as against the acceptor. This decision is applicable to the present case. For the same reason, in order to effectuate the intention of the parties, it was held in *Felder v. Marshall* (d) that the instrument could be declared on as a promissory note. In that case an instrument purporting on the face of it to be a bill of exchange drawn by A., payable to the plaintiff or order, was accepted by B., and handed to the plaintiff in satisfaction of rent due to her from A. In the place where the direction to the drawee is usually found, the name and address of the payee were inserted. The whole instrument, except the drawer's name, was in B.'s handwriting; and it was held that the payee could recover upon it as a promissory note. He referred to *Armfield v. Allport* (e).

Darley in support of the plea. This instrument is not a cheque or promissory note clearly, and it is submitted that it is not a bill of exchange; for it appears by the declaration that the supposed drawee did not live in, or could not be found in, Mudgee, and therefore the place may be taken to be fictitious. [*Stephen, C. J.* But why? and even if so, is it not equally a bill of exchange?] It is submitted that it is not a bill of exchange, as the name and description of the drawee do not sufficiently appear on the face of the instrument. The law on this point is laid down by *Story* (f) as

(a) 4 Camp. 115. (b) 3 M. & G. 576; 30 L. J. C. P. 158.
(c) 8 Taunt. 739; 27 L. J. Ex. 42. (d) 30 L. J. C. P. 158.
(e) 27 L. J. Ex. 42. (f) On Bills, s. 58.

follows—"It has been sometimes thought that according to our law, the want of an address to any particular person, as drawee, may, if the bill be drawn payable at a particular house or place, be well deemed a good bill of exchange in favor of an indorsee; and, if accepted by another person, at the place or house designated, it will bind him as acceptor; but the more recent cases throw much doubt over this doctrine, and strongly incline to the opinion that an address to some particular person is essential to a true and proper bill of exchange." The authority in support of this proposition is *Peto v. Reynolds* (a), where the Court seemed inclined to doubt *Gray v. Milner*; and *R. v. Hawkes* (b), where, notwithstanding the absence of any payee on the face of the bill, the prisoner was found guilty of uttering a forged acceptance, was altogether disapproved. *Parke, B.*, says—"I must own that but for that case I should have had no doubt, that the law merchant required that every bill of exchange should have a drawer and a drawee." And *Alderson, B.*, says—"With respect to the question whether this instrument is or is not a bill of exchange, the case of *Regina v. Hawkes* is undoubtedly in point. I must own, however, that I now think that I was wrong on that occasion." He referred to *R. v. Hunter* (c).

1865.
GORDON
and another
v.
BOWMAN.

STEPHEN, C. J. I am of opinion that the instrument is a bill of exchange, and not a cheque or a promissory note. It is signed by the person making or drawing it, and it is in the imperative form. It says, "At sight pay &c.," and implies a direction or command to the person to whom it is presented to pay it at sight. It will be conceded that it is a bill of exchange if properly directed. If a bill were directed to London it would be absurd; but if to a specified house in Cheapside, would it not be directed to the person who lives in that house? Here it is directed to the person who is at the residence of *Thomas Henry Linden*—that

(a) 9 Exch. 410.

(c) Russ. & R. 511.

(b) 2 Mood. 60.

1865.
GORDON
and another
v.
BOWMAN.

is, to *Thomas Henry Linden*, because he is the master of that house ; so that, in my opinion, the instrument is a bill drawn on *Thomas Henry Linden*, and is payable by him at his residence ; and if *Thomas Henry Linden* be not found, the bill can be protested. The first three counts of the declaration, therefore, are bad ; and the fourth is good. The plea, therefore, which is pleaded to the declaration is, as to three counts, good, and as to one count bad. Why ought the Court, under such circumstances, to give judgment against the plea ? I am of opinion that the demurrer can be taken distributively, and that we can give judgment on the whole record in accordance with the principle recognized in *Blagrove v. Bristol Water-works Co.* (a), and in *Cummings v. Clifford* (b). Wherefore the demurrer is overruled as to the three first counts, *i.e.*, the plea with respect to those counts ; but is sustained as to the fourth.

CHEEKE, J., concurred.

FAUCETT, J. I am of the same opinion. The plea is, I think, distributive ; in other words, it is good as to the first three counts, and bad as to the fourth.

Judgment accordingly.

(a) 1 H. & N. 369 ; 26 L. J. Ex. 57.

(b) 3 Sup. Ct. R., C. L. 185.

1865.

THE QUEEN *against* DAWSON.

September 23.

SPECIAL case reserved for the consideration of the Judges, under 13 Vic., No. 8.

"At the Court of General Sessions, holden at Mudgee, in the colony of New South Wales, on the twenty-eighth day of June, one thousand eight hundred and sixty-five.

"The prisoner was tried before me on a charge of obtaining money from one *George M'Guiggan*, an inn-keeper, under false pretences (a).

"The evidence adduced at the trial proved that the wife of the prosecutor, by her husband's direction, changed a £10 cheque of the prisoner's at his request, giving him £6 8s. in money, the remainder being due for board, &c.; that the prisoner said, on handing the cheque to *M'Guiggan*, that 'he had sent money to the amount of about £500 down to the Oriental Bank in Sydney, for cattle, which he had then recently sold;' that the prosecutor had sent the cheque to Sydney for collection, and that it was returned dishonored.

"The corresponding officer of the said bank deposed that the prisoner had opened an account in the said bank on the 9th of January, 1865. He had on that day paid in a sum of twenty pounds, and on the twentieth day of the same month, a further sum of thirty-six pounds and ninepence; that he had only ninepence to his credit in

The prisoner was charged with falsely pretending that a cheque drawn by him was good, and that he had sent £500 down to the Oriental Bank to meet it. At the trial, the evidence was only that of the accountant of the bank, who had no knowledge of the facts except as derived from the bank books, it not being his business to receive monies. The cheque was not shown to have been presented. *Held*, that the evidence was defective, and the conviction was quashed.

(a) The information charged that the prisoner "on the first day of May, 1865, unlawfully, knowingly, and designedly, did falsely pretend to one *Jane M'Guiggan*, that a certain warrant and order for the payment of money, then presented and delivered by him the prisoner to the said *Jane M'Guiggan*, was a good and valid order for the payment and of the value of ten pounds; and further, that he, the prisoner, had before then forwarded to the Oriental Bank, Sydney, a cheque to be placed to his credit for the proceeds of cattle which he had sold; by means of which false pretences he, the prisoner, did then and there obtain from the said *Jane M'Guiggan*, a certain of money, to wit, to the amount of £6 and 12s., the property of one *George M'Guiggan*, with intent to cheat and defraud." The information then alleged that both pretences were false, and that the prisoner well knew the same. The evidence was that the pretences were made some time in the month of April, 1865, the correct date not fixed.

1865.
The QUEEN
v.
DAWSON.

the said bank for three months prior to the second of May last, when that amount was sent by the witness to close his account; that the prisoner never forwarded or sent a sum of five hundred pounds or thereabouts to the said bank, or any other sum than the two above mentioned.

"On cross-examination, the witness deposed that he had nothing to do with receiving or paying money into or out of the said bank; that his knowledge was gained from what he had seen in the bank books, and that the ledger alone contained the whole account. This witness further deposed, that no man bearing the prisoner's name has or had any money in the said bank.

"On cross-examination also, the officer of the bank produced a letter from the prisoner to the bank, dated the 27th April, 1865, inquiring why his cheques upon the bank had been dishonored; and Mr. *Lee*, counsel for the prisoner, produced the answer of the said bank, written by the said officer, to the effect that the prisoner had only a balance of ninepence to his credit, and enclosing that amount in postage stamps.

"I directed the jury, if they were satisfied that the prisoner had made the representation as deposed to by the prosecutor, that the prosecutor had given cash for the cheque on the faith of that representation, and that such representation was false, they should find the prisoner guilty; but that if they were not satisfied by the evidence on all those points, they should acquit him.

"The jury found the prisoner guilty.

"Mr. *Lee* objected.—1st. That the evidence of the said officer of the bank as to the state of the prisoner's account with the said bank was insufficient. 2nd. That I ought to have directed the jury that there was no proof of the presentation and dishonor of the cheque; and that such proof was necessary to warrant a verdict of guilty.

"On the application of prisoner's counsel, I reserved these questions for the consideration of the Judges of the Supreme Court.

"HENRY CARY, Chairman Q. S.,
"August 3rd, 1865."

Isaacs for the prisoner. The evidence as to the prisoner's account at the bank was not sufficient. The Crown also should have shown that the cheque had been presented and dishonored. In *R. v. Flint (a)*, the prisoner was charged with delivering certain promissory notes as for good and available promissory notes which he knew to be not good nor of any value, the notes purported to be the notes of a country bank. A witness stated that he recollected the bank stopping payment seven years before, but he added that he knew nothing but what he saw in the paper, and heard from people who had bills there. The notes appeared on the face of them to have been exhibited under a commission of bankruptcy against the bank in question. The evidence was considered defective, in not sufficiently showing that the notes were bad.

1865.
The QUEEN
v.
DAWSON.

Butler for the Crown. It is submitted that the objection that the evidence of the bank clerk was defective, ought to have been specifically taken at the trial, and not having been taken, is not now available; *Williams v. Wilcox (b)*, *Doe v. Benjamin (c)*. At all events, there was sufficient evidence for the jury to act upon. *R. v. Cook (d)*, *R. v. Burdett (e)*, were referred to.

STEPHEN, C. J. Without deciding that in every case a cheque must be presented for payment, or that every teller or receiving clerk in a bank must be called to prove the absence or deficiency of funds to a customer's credit, I am of opinion that the evidence in this case was insufficient to prove the false pretence alleged. For there was (as I collect) no presentment of the cheque, or at all events, none was proved; and there was no evidence to disprove the plaintiff's statement that money was sent down by him (not necessarily by post) to meet his cheques. If it had been clearly shown that there were no funds, and no reasonable expectation of them, presentation might be dispensed with. But here the case

(a) Russ. & R., p. 461.

(c) 9 A. & E. 650.

(b) 8 A. & E. 337.

(d) 1 F. & F. 66.

(e) 4 B. & A. 95.

1865.
 The QUEEN
 v.
 DAWSON.

failed on that first point. The mere fact proved in this case that the books of the bank showed no funds, is not enough. The officer called, admits that it was not his duty to pay away or receive money, and that all his knowledge on the subject was obtained from the books of the bank. What is that but to allow the books of the bank, or rather secondary evidence of those books, to be given in evidence. The word "valid," used in describing the instrument in the information, seems to me to be incorrect. In *Flint's* case, the word used is available.

HARGRAVE, J. The learned Chairman has used such ambiguous expressions, and there are such large omissions of the necessary evidence, as it appears by the case, that I think both objections must prevail.

CHEEKE, J., concurred.

Prisoner discharged.

March 23,
 1866.

THE QUEEN *against* JAMES ARMSTRONG.

Information before two justices, under the Inclosed Lands Trespass Act of 1854, the 18 Vic., No. 27, against A.'s son, who set up as his excuse for the alleged trespass, that he did it by the authority of A., who claimed the property. He then called A. as a witness, who swore that he had a claim to the land, when in fact he had no such claim. On this the justices dismissed, or the prosecutor withdrew the case. *Held*, (*Hargrave, J., dissentiente*), that A. could not be convicted of perjury in that he had so sworn.

SPECIAL case under 18 Vic., No. 8.

"In this case, the prisoner was tried before me for perjury, alleged to have been committed before the Petty Sessions assembled, at Liverpool, on the 8th of December last.

"A copy of the information accompanies this case (a).

"It appeared by the evidence of the Clerk of Petty Sessions, and by the Court book produced at the trial, that the proceedings before the magistrates, and on which prisoner gave evidence, were against the son of the prisoner, for trespass upon enclosed lands, contrary to the Colonial Act, 18 Vic., No. 27, and that the prisoner swore before the magistrates that he claimed some right

that he had a claim to the land, when in fact he had no such claim. On this the justices dismissed, or the prosecutor withdrew the case. *Held*, (*Hargrave, J., dissentiente*), that A. could not be convicted of perjury in that he had so sworn.

(a) The perjury assigned was in that the defendant had sworn that he had a claim on the land.

or title to the paddock said to be trespassed upon, under some written agreement, for a term of about one year and a-half, from 8th December, 1864, to 1st May, 1865, from the prosecutor *Lester*, but different from the agreement then and now produced by *Lester* as the genuine agreement; and that upon such claim of right or title the case appears to have been withdrawn. The magistrates dismissed the case, being of opinion that such claim of right or title was within the first section of the Act 18 Vic., No. 27.

1866.
The QUEEN
v.
ARMSTRONG.

"Mr. *Stephen* defended the prisoner, and at the close of the case for the Crown, objected to the case going to the jury, on the ground that the oath in question had not been taken before a Court of competent jurisdiction, and that, therefore, no indictment would lie for perjury. He quoted the last edition *Greeves Russell and Archbold*.

"I decided against the objection, but reserved the point at Mr. *Stephen's* request for the consideration of the full Court. The jury found the prisoner guilty, with a recommendation to mercy.

"JOHN F. HARGARVE."

Stephen for the prisoner. The oath must be taken before a person who has jurisdiction of the matter; Arch. Cr. Pl. (a). The law is thus laid down in a work of great authority (b):—"the oath must be taken before a competent jurisdiction; that is, before some person or persons lawfully authorised to administer it. And it seems clear, that no oaths whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing, or before those who are legally authorised to administer some kind of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarrantable and merely void, can ever amount to perjuries in the eye of

(a) p. 678.

(b) 3 Russ. C. & M. 6.

1866.
 The QUEEN
 V.
 ARMSTRONG.

the law, because they are of no manner of force, but are altogether idle." It is contended, that on the facts then appearing to the justices, and then conceded or acted on, the justices had no jurisdiction over the case. If so, they never had jurisdiction. At the moment of the prisoner's swearing, it is submitted, there was none, and consequently there was no perjury. The perjury was assigned on matter that took place after the claim of title was made; whereas by such claim being made, the jurisdiction of the justices was ousted *ab initio*. It is admitted that if a claim is made which is false, fraudulent, and for the purpose merely of ousting the jurisdiction, the justices would be entitled to go on and determine that the claim was so, and this Court would not review their decision. But here the justices admitted that the claim was sufficient, and did not go on. In *Marsh v. Daves* (a), Parke, B., says, "If the question had been respecting damage charged to have been done to this dwelling-house, or the value of goods taken in it, and the defendant had set up a false title to the house or goods, in order to prevent the (County Court) Judge exercising his rightful jurisdiction, there would then have been a *mala fide* claim of title, and the County Court would have had jurisdiction over the cause." But the question raised here, and the question which the parties came to try was, had the defendant a right to this dwelling-house as against the plaintiff? That is a claim of title to land, and whether made *bona fide* or *mala fide*, is immaterial for the present purpose.

Windyey for the Crown. It is submitted that the Court here had jurisdiction. It is clear that the justices had jurisdiction over the subject matter, and to entertain, if not decide the case. They must decide whether or not there was a claim of title, and the evidence in support of that title was material.

STEPHEN, C. J. In this case an information was laid before two justices, under the "Inclosed Lands Trespass Act of 1854," against the prisoner's son, who set up as

(a) 17 Jur., 558.

his excuse for the alleged trespass, that he did it by the authority of his father (the prisoner), who claimed the property. He then called the prisoner as a witness. The prisoner swore that he had a claim to the land. On this the justices dismissed, or the prosecutor withdrew, the case. The perjury assigned was, that the defendant had so sworn; it being alleged and now found by the jury that the defendant had no such claim. I am of opinion that the justices ceased to have any jurisdiction *eo instanti* that the claim or defence involving the question of title was made by the son, unless indeed it appeared that he knew his father to have no title; and so that he himself set up the excuse in fraud of the jurisdiction, and merely to oust it. This fact not having been found, and not appearing, the justices had no authority to inquire into the excuse or the title, or proceed in the case farther. Consequently there was no perjury, for the oath was taken before a tribunal having then no jurisdiction.

It seems to me that it would make all the difference in the case if the defence had been set up by *James Armstrong*, the father, who, knowing that he had no title, relied on this plea merely to oust the jurisdiction; in such a case, I am inclined to think that the conviction would have been right. The remarks made in *Marsh v. Dewes* are startling, but still I think that a man might be indicted for perjury if he made a false claim of title merely to oust the jurisdiction of the justices.

But this is a very different case. Here *William Armstrong*, the son, set up the claim. How can we tell that he knew that his father would give false testimony? When the father took the bible into his hand, the justices were ousted of their jurisdiction. If the jury had been asked whether the son made this claim for the mere purpose of ousting the jurisdiction of the justices by false swearing, the case might have been otherwise. But with the present materials, we cannot say that it was not a *bona fide* defence on the part of *William Armstrong*, and therefore when he called as a witness *James Armstrong*, who gave the false evidence, then the jurisdiction of the justices was gone. Their jurisdiction was ended before the defendant gave his evidence.

1866.

The QUEEN
v.
ARMSTRONG.

1866.

The QUEEN
v.
ARMSTRONG.

HARGRAVE, J. It seems to me that the son only set up this claim as an excuse. It was the father that claimed title, and the oath was taken by him alone; and he was, in my opinion, guilty of perjury. It seems to me that the jurisdiction was not ousted, until after the crime of perjury had been committed. It is an absurd state of the law, if, when a man gives false testimony in support of a claim of title which he himself has set up in his own name, it is perjury; but it is not perjury, if he gives false testimony in support of a claim of title by another.

CHEEKE, J. I think that when the claim was made by the son, the jurisdiction of the justices was gone (a).

Conviction quashed (b).

March 23,
1866.

RUSDEN *against* BAGNALL (c).

Trespass for breaking and entering a certain station of the plaintiff, called A.

Plea on equitable grounds, after alleging that before, &c., there had been a dispute between the plaintiff and defendant as to the boundaries of their respective

runs A. and B., set forth an arbitration and award in pursuance of the provisions of the Crown Lands Occupation Act of 1861. It then averred that by the award, it was directed that a certain line should be struck and measured, and that the defendant was entitled to a lease of the country to the east, and the plaintiff to a lease of the country to the west of the said line. Averment, that the land trespassed upon lay to the east of the said line. *Held*, on demurrer, bad.

TRESPASS for breaking and entering a portion of certain cattle and sheep stations of the plaintiff's, called Birrery.

Pleas—1. That the land whereon, &c., was at the several times when, &c., Crown Land, and before the committal of the alleged trespasses, or any part thereof, a promise, engagement, and contract was made and entered into by and on behalf of the Crown, through its agent lawfully authorised, to and with the defendant, that in consideration of certain rent to be paid by the defendant, a lease of the said land should be granted to the defendant, under the orders in Council and regulations from time to time issued under the Imperial Act, 9 & 10 Vic., c. 104, for a term of years, which term was

(a) See *Chaytor v. Pease*, 32 L. J. M. C., 121; and *R. v. Huntsworth*, 33 L. J. M. C. 131.

(b) See 16 Vic., No. 1, s. 13.

(c) Before *Stephen, C. J.*, *Hargrave, J.*, and *Cheeke, J.*

at the said several times when the said trespasses were alleged to have been committed, unexpired. Averment of entry by the defendant, under and by virtue of the said promise, &c.

Demurrer and joinder.

2. This plea relied on a similar promise of a lease to be granted under the Crown Lands Occupation Act of 1861.

Demurrer and joinder.

3. By way of equitable defence, that before the committal of the said alleged trespasses, or any part thereof, a dispute arose between the plaintiff and the defendant, as to the boundaries of their respective runs Birrery and Coolah, and in pursuance of the provisions of the Crown Lands Occupation Act of 1861, the plaintiff, under his hand in writing, appointed one arbitrator, namely, *H. G. Baker*, and the defendant, under his hand in writing, appointed another arbitrator, namely, *O. B. Ebsworth*, to enquire into and determine, in accordance with the provisions of the said Act, as to the boundaries of the said runs and the right to a lease of the lands so in dispute as aforesaid; and the said *H. G. Baker* and *O. B. Ebsworth*, before they entered upon the reference, by writing under their hands appointed *T. Cadell* as umpire; and the said *H. G. Baker* and *O. B. Ebsworth*, as such arbitrators, and the said *T. Cadell*, as such umpire, before they entered upon the consideration of the matters referred to them, severally made and subscribed before a justice of the peace the declaration required by the said Act; and afterwards the said arbitrators and umpire enquired into the matters so referred to them, and took evidence thereon. And the said *H. G. Baker* and *O. B. Ebsworth* not having agreed upon the matters so referred to them, the said *T. Cadell* thereupon in due time, took upon himself the burden of the said arbitration and umpirage; and having considered the matters so referred to him, and the evidence taken thereon, in due time made his award in writing, and transmitted the same to the Chief Commissioner of Crown Lands; and by his said award, *T. Cadell*, amongst other things,

1866.
RUSDEN
V.
BAGNALL.

1886.
RUSDEN
v.
BAGNALL.

awarded and directed that a due east and west line should be struck, commencing at a point where a north and south line would intersect the Kiln Creek, half a mile above or to the east of Birrery hut, the said east and west line to be run thence to the mountain range or boundary then claimed by the plaintiff; and that the said east and west line so to be struck as aforesaid, should be duly measured, and a point taken in the centre of the said east and west line midway from point to point, then a north and south line should be struck and marked to intersect the said east and west line at the said spot, to be marked in the centre of the said east and west line; and by his said award, the said *T. Cadell* further awarded that the defendant was entitled to a lease of the country lying to the east of the said north and south line so to be struck, and intersecting the said east and west line as aforesaid; and that the plaintiff was entitled to a lease of the country lying to the west of the said north and south line. Averment, that the land whereon the said trespasses were alleged to have been committed, lies to the east of the said north and south line so to be struck, and intersecting in the middle the east and west line as aforesaid.

Demurrer and joinder (a).

Darley in support of the demurrer. The first and second pleas are clearly bad. The point has been distinctly decided in *Richards v. Whitford* (b). They do not allege that rent has been paid as is required by the 55th regulation. The third plea is also bad. This being an action of trespass, the plea admits the plaintiff's possession, but justifies the trespass on the ground that before the trespass, an award had been made which would entitle the defendant to a lease of the land. It is clear that until the lease was executed in pursuance of the

(a) There was a replication on equitable grounds to the third plea, alleging that the line mentioned in the award had not been run; and that the award did not direct any person, nor was it any person's duty to run the line, and that the award had not been acted upon. But the insufficiency of the pleas rendered it unnecessary to consider the demurrer to the replication.

(b) 3 Sup. Ct. R., C. L. 294.

award, the defendant was not entitled to enter. There is nothing to show that the award will be carried into execution. *Ex parte Ogilvie* (a) decides that it is discretionary with the Crown to carry out the terms of the award. [Stephen, C. J. This plea was filed before that decision was known]. It is plain that although the award is in favor of the defendant, the Crown might grant the land to the plaintiff. It is laid down that an arbitrator by his award cannot transfer the right to an interest in lands from one to another, whether the submission be by deed or otherwise; *Russell on Awards* (b). The award cannot operate as a conveyance of land either freehold or an interest for years; *Rolle Ab. Arb. A.* (c), *Bac. Ab.* (d), *Vin. Ab.* (e), *Berry v. Kirwan* (f). It is not good as an equitable plea; for if the facts stated in the plea were set forth in a bill, a Court of Equity would not grant an unconditional injunction. It is submitted that if a Court of Equity, pending the decision of the Crown as to whether the award should be carried into execution, did grant an injunction, and thereby permit the defendant to commit trespasses, it would only be upon the terms of his giving security to answer in damages for such trespasses, in case the decision of the Crown should be against him; *Wakley v. F'roggatt* (g).

1866.
RUSDEN
V.
BAGNALL.

Stephen in support of the pleas. The third plea can be supported as an equitable plea; because a Court of Equity will treat as done those things which ought to be done. The award having directed the line to be marked out, Equity will, if necessary, appoint a person to mark it.

STEPHEN, C. J. The first two pleas are clearly bad for not showing that the land is Crown land within the meaning of the provisions of the Crown Lands Occupation Act of 1861, in that behalf, and that no actual lease of it is in force.

(a) 4 Sup. Ct. R., C. L. 51.

(c) 242.

(e) 3 vol. p. 40.

(b) Pt. 2 Ch. 155.

(d) 1 vol., p. 266.

(f) 9 Ir. C. L. R. 495.

(g) 33 L. J. Ex. 46.

1866.

RUSDEN
v.
BAGNALL.

The equitable plea sets up an award under that Act, giving the land to the defendant. An award can entitle a person to have it enforced, but it cannot give title. It has also been decided that it is not compulsory on the Crown to carry into effect the terms of the award; how then can the award be any justification of the trespass complained of? Would a Court of Equity grant an injunction on such award? I notice also that the plea states that by the award, the umpire directed that a certain line "should be struck." But I should be inclined to think that to make the award good, the metes and bounds would have to be settled by it. By this award apparently the land is not marked out. Judgment, therefore, must be given for the plaintiff, with leave to amend the first and second pleas.

HARGRAVE, J., and CHEEKE, J., concurred.

Judgment for the plaintiff.

GIBSON *against* M'GEORGE (a).

In an action for trespasses to land, which the defendant justified by reason of a right of way of necessity, it appeared that in and before 1835 the defendant occupied a certain farm, bounded on three sides by granted lands, and on the fourth side by waste lands of the Crown, which were granted to the plaintiff in 1835. The defendant's occupation of the said continued up to 1839, when he obtained a grant of the same. *Held*, that when the Crown granted the waste land to the plaintiff it reserved to itself a way of necessity over the same to and from the defendant's farm, and that the same right passed by the grant of 1839 to the defendant.

TRESPASS *quære clausum fregit*.

Pleas—1. That the close was the land and freehold of the Crown, and that the defendant, by the authority of the Crown, committed the alleged trespass. 2. A Right a Way of Necessity. 3. Right of Way by non-existing grant. 4. A Public Right of Way. Issue thereon.

At the trial of this cause before *Stephen, C. J.*, at the Goulburn Assizes, in October, 1865, two out of the four

three sides by granted lands, and on the fourth side by waste lands of the Crown, which were granted to the plaintiff in 1835. The defendant's occupation of the said continued up to 1839, when he obtained a grant of the same. *Held*, that when the Crown granted the waste land to the plaintiff it reserved to itself a way of necessity over the same to and from the defendant's farm, and that the same right passed by the grant of 1839 to the defendant.

Semble, that even although the Crown had not before 1835 actually granted all the lands adjoining the defendant's farm, this implied reservation of a right of way of necessity to the defendant's farm equally existed, as neither the Crown nor the defendant could reach the latter farm without violating the rights of his neighbours.

(a) Before *Stephen, C. J.*, *Cheeke, J.*, and *Faucett, J.*

issues raised were found for the plaintiff. On the other two, being on the second and fourth pleas, there was a verdict for the defendant. The action was for trespasses to land, until the year 1835 ungranted and waste, but in that year purchased by and granted to the plaintiff—or to her husband, from whom she claimed. The defendant justified those trespasses, in his second plea, (he being the owner of a farm adjoining), by reason of a right of way *of necessity*; and, in his fourth, he alleged that the place trespassed on was a *highway*.

1866.
GIBSON
v.
M'GEORGE.

The case was this. The defendant and several other persons, in or about the year 1829, obtained possession from the Crown of land lying westward of, and bounded by, a small creek. Each had 100 acres allotted to him, abutting successively on each other; one *Wichelo* being the most southerly, and *Warmby* the farthest north. *M'George's* farm lay next below *Warmby's*; and *Teece* and *Brown* intervened, between those of *M'George* and *Wichelo*. On the *east* of the creek, and bounded by it on that side, but higher up (that is to say still farther north) than *Warmby's* farm, a man named *Harley* had a similar small location, and others were beyond. All appear to have settled there, at or about the same period. To the south of *Harley's*, on the same eastern side of the creek, lies the land eventually purchased by *Gibson*; stretching away southwards, past the five farms first mentioned—and embracing a tract which, until its purchase, was nominally a village reserve. Immediately below that reserve, in a line south of it and of *Wichelo's* farm, Dr. *Gibson* owned a large granted property, not purchased, extending over both sides of the creek, and along the entire length of that farm. From the year 1829 or 1830, the several small settlers named continued to occupy their farms, and (it must be presumed) sooner or later under grants for that purpose; although the defendant did not obtain his grant, it seems, until the year 1839. Dr. *Gibson* and his family occupied, during the same period, all the land south of *Wichelo* and of the said reserve.

Throughout that period, and, except as to the deviations presently mentioned, up to 1855, being the date of

1866.
GIBSON
v.
M'GEORGE.

his purchase of the reserve, or even later, a public road—gradually formed by the necessities of travelling, and used by every one in the neighbourhood,—ran all along the boundary of the creek, more or less near to its edge in different parts, through Dr. *Gibson's* land, from its extremest southern limit, up to and through the village reserve, and thence northerly into and beyond *Harley's* farm. It was, in fact, during the larger portion of that time, the only highway from the settlements or townships of Bungendore and Braidwood to Goulburn; and, confessedly, either the same road or one substituted for it exists still at the Braidwood and Goulburn public road. But, originally, the line of road passed much nearer to the creek than it does now. At *Brown's* farm, near its south-eastern extremity, the road actually crossed (shortly afterwards re-crossing) the creek; and it thence entered *Harley's* farm, over the then vacant land on the south, at a point much westward of the present road. And from that point, the line proceeded through *Harley's* farm in a direction likewise westward of the existing line. Neither line of road ever touched *M'George's* farm; but he was accustomed to pass over the said vacant land, *eastwards*, and there get into the general track—and afterwards go along the road as others did. To reach that road, in short, the plaintiff had for a considerable distance to travel over land which was at no time part of the road. It appeared also, that the Crown had erected some barracks near the then existing road, and established a village there, and also repaired the road by some convict gangs.

The deviations in the line were occasioned in the first instance, apparently, by floods in the creek; but the greatest change in its direction, it is certain, took place so long ago as the year 1832, or earlier. About that time, *Harley* fenced in a large portion of his south boundary, commencing from the creek; and he thus forced the traffic, and practically altered the line of road, to a point and along a course at the extremity of his fence, much eastward of the former line. After the erection of this fence, *M'George* used the new line in common with all other travellers. Eventually the direc-

tion of the road farther south—through the site of the old village reserve, and the *Gibson* property below it,—was altered still more to the east. And some years ago the plaintiff fenced in the entire line, (through the reserve, and thence up to and over the land trespassed on), so that the defendant could no longer get to the high road, without removing in part that fence or the fence put up by *Harley*.

1866.
GIBSON
v.
M'GEORGE.

Upon this state of facts the jury found as to the plea of a right of way of necessity, that the defendant never had any other mode of access to his farm, than one over the land in question; and that the way used by him, such user being the trespass complained of, was and is the most natural and convenient one for that purpose. As to the plea of a highway, the jury found that there was one along the course alleged, by dedication to the public—not merely by the Crown before 1835, but, since that time, by the deceased purchaser of the land and his representatives.

A rule *nisi* having been obtained by the plaintiff for a new trial, on the ground that the findings on the fourth plea could not be supported, as there was no sufficient evidence of a dedication of the way in question either by the Crown or by Dr. *Gibson*, or the plaintiff; and as to the second, that, assuming the facts to be as found, the verdict could not be sustained in point of law, Nov. 28, 1865.

Butler for the defendant now showed cause. The several owners of land north and south of the defendant's land, occupied their respective allotments as promisees under the Crown, and presumably as grantees, and had no other access or exit to or from their land except over the locus. But this defendant is shown not to have obtained any grant from the Crown till after plaintiff's husband got *his* grant. A way of necessity, therefore, was reserved by or out of that grant to the Crown itself, and its promisee *M'George*, in respect of the latter's allotment. This is according to the doctrine laid down in the note to *Pomfret v. Rycroft*: "When a man having a close surrounded with his own land grants the March 8, 1866.

1866.

 GIBSON
 v
 M'GEORGE.

close to another, in fee, or for life, or years, the grantee shall have a way to the close over the grantee's land, as incident to the grant; for without it he cannot have any benefit from the grant. So it is when he grants the land and reserves the close to himself." The law on this point has recently been recognised in *Pinnington v. Gallard (a)*, in which case, after referring to the note in *Pomfret v. Rycroft*, the judgment continues, "It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant, but the law is distinctly laid down to be so, and probably for the reason given in one of the authorities," that it is for the public good, as otherwise the close surrounded would not be capable of cultivation. And this "way" the Crown inferentially granted afterwards to the defendant when it granted to him the said allotment. The defendant's land was absolutely land-locked by the other allottees and isolated; so that the defendant could not get out otherwise than as he did, over the plaintiff's land. It is submitted that there is a way of necessity equally to a grantor as to a grantee, *Pinnington v. Gallard*; and the Crown here retained, for the benefit of this defendant and others, that right of way; *Asher v. Whitelock (b)*.

The facts showed that this was such a way. The "deviation" existed at the time of the grant to *Gibson*. All the allottees are presumably legal owners in fee. The defendant had no right to trespass on them.

In *R. v. East Mark (c)*, it is distinctly laid down, that the Crown may dedicate a road to the public and be bound by long acquiescence in public user; and this Court held in *Rapley v. Martin (d)*, that a road having been mentioned in a Crown grant, was a circumstance raising a presumption that the Crown had thereby dedicated it to the public. In the present case there was a dedication by the Crown, evidenced by the putting up of barracks near the then existing road, and the establishing of a village, and repairing the road itself by the convict gangs. The successive deviations do not defeat the right. There

(a) 9 Exch. 1; 22 L. J. Ex. 349, 353, 355. (b) 35 L. J. Q. B. 17.

(c) 11 Q. B. 877.

(d) 4 Sup. Ct. R., C. L. 173.

were not two roads on any part of *Gibson's* land, but two on the vacant ground which was then Crown land, but afterwards granted to the plaintiff. In *Daves v. Hawkins* (a), there was evidence that there had been a highway over adjacent land, which was then, together with the *locus in quo*, an open common ; that for many years the highway was obstructed by part of it being included in an enclosure, which had illegally been made on such common, and that during twenty years of that time, the public had deviated a little from the line of way, by going outside such enclosure and on the *locus in quo*. At the end of such time, and before the plaintiff became the owner of the *locus in quo*, the use of such substituted line of way was discontinued, by reason of a new road having been laid out in a different direction by an adjoining land proprietor. Afterwards the obstruction to the old road was removed, and the original line of road was reopened to the public. The majority of the Court held that there was no reasonable evidence upon the above facts, on which a jury might find that there was, in addition to any other highway, a highway running over the *locus in quo*. *Erle, C. J.*, in his judgment says, "The parties who passed intended to use the original highway, and probably deviated without knowing it. If they knew the true line and deviated by reason of the obstruction, the user of the line of deviation over the adjoining land, by reason of a wilful obstruction, is no more the user of a highway as of right, than the user of a deviation over the adjoining land by reason of the highway being foundrous. If the user of a line of deviation is not the user of a highway, then the user of such deviation for twenty years would not alter the nature of the act, for if the first traveller who preferred turning aside to beating down the bank and passing through it, did not use a highway, neither did the second, or those that followed." And *Byles, J.*, adds, "It further appeared that the deviation was not confined to a single defined track, but was, at least occasionally, exercised widely over the down. It

1866.
GIBSON
v.
M'GEORGE.

(a) 8 C. B. N. S. 848 ; 29 L. J. C. P. 343 ; 7 Jur. N. S. 263.

1866.
GIBSON
v.
M'GEORGE.

is difficult to suppose that the owner of the soil could have assented to so extensive a dedication as such an user would imply." It thus appears that the question is altogether one for the jury, who in this case have found in the defendant's favor.

The *Attorney-General* and *Blake* contra. The defendant could have got from the Great Yass Road, by passing to the west, which was open Crown land. *Holmes v. Goring (a)*, shows that if this is a way of necessity, it only continues so long as the necessity continues, and no longer. The question in that case was, whether the way of necessity which was admitted to have existed when the defendant sold the close now occupied by the plaintiff, was defeated by the fact that by a subsequent purchase he was enabled to approach the close over his own land; the defendant contending that the necessity of the way was to be considered with reference to the condition of the property at the time of the sale of the two closes. The Court held that the way of necessity ceased as soon as the defendant had any other means of access to the close to which it led. But if the way of necessity contended for ever existed, it must remain in its first original course. Such a way is in effect by grant. The ground on which a way of necessity is created is, that a convenient way is implied by grant as a necessary incident; *Pearson v. Spencer (b)*, *Procter v. Hodgson (c)*. The defendant obtained his land in 1829, and used a way of necessity for seven or eight years through the land of *Harley*, one of the pensioners, and therefore for seven or eight years that particular way of necessity existed. It seems that in 1835, *Harley* fenced it across, but the defendant possessed no right to diverge because *Harley* had thus fenced. There was nothing to show that the track subsequently used was a defined track. It was shifting, although in a particular direction, through waste land not fenced in. But there could be no necessity for defendant to go over this line,

(a) 2 Bing. 76.

(b) 1 B. & Sm. 571 ; In Ex. Ch. ; 3 B. & Sm. 761.

(c) 10 Exch. 824.

for he had a highway to the west of it. *Harley's* fencing did not create a *new* highway; at all events not by "dedication."

1866.

GIBSON
v.
M'GEORGE.

It is submitted that the track called the way of necessity, if it was such, should have been asserted against *Harley*, and his fence have been removed. Because *Harley* obstructed the old way, the defendant cannot take another. But the defendant was entitled, while the obstruction lasted, to go to the east of the fence and along *Harley's* land there; but, *Dawes v. Hawkins*, which has been relied on by the other side, shows that *Harley's* obstruction would not give a right of way by necessity over the land of the Crown, and that the user thereof, under such circumstances, would not be a user of it as a highway as of right. [*Stephen*, C. J. But the defendant could not get there without passing over the Crown, now *Gibson's* land]. It is also clear that there cannot be two rights of way by necessity.

It is also submitted that there was no evidence of any dedication by the Crown. The plaintiff's grant was made in 1835, that to the defendant in 1839; and, therefore, there could not have been a way of necessity granted by the Crown to the defendant. For the Crown could not grant in 1839 a way over land alienated to the plaintiff four years before.

There was no evidence of dedication by the *Gibson* family. A dedication must be with an intention to dedicate. The mere acting, so as to lead persons into the supposition that the way is dedicated, does not amount to a dedication, if there be circumstances explaining the transaction; *Barraclough v. Johnson* (a). In the words of *Parke*, B., in *Poole v. Huskinson* (b), "In order to constitute a valid dedication to the public of a highway by the owner of a soil, it is clearly settled that there must be an intention to dedicate; there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."

(a) 8 A. & E. 99, 103.

(b) 11 M. & W. 827.

1866.

 GIBSON
 v.
 M'GEORGE.

The mere user by the public of various tracks through a wood where they were free to wander almost as they pleased is not sufficient evidence of a dedication of such tracks to the public as footways; *Chapman v. Cripps* (a).

Cur. adv. vult.

May 16, 1866.

STEPHEN, C. J., now delivered the judgment of the Court as follows:—

After stating the facts of the case as given above (b), His Honor continued—We think that the jury had sufficient evidence, to justify their finding a dedication of the old line of road; but it is difficult to say this, as to the successive deviations—or at all events as to the one at *Harley's* fence. A dedication, although if once made it is irrevocable, must in the first instance be intentional. Now, as there was no access to any of the farms spoken of, or to the village reserve, or Dr. *Gibson's* own land, except by the road in question, and it was used publicly for several years, and repaired once by labourers in the Government service, the Crown might reasonably be taken to have dedicated, we doubt not, that one old line. A deviation, also, it is possible, may be similarly dedicated; and the more modern line, in at all events the more southern portion, was not improbably meant by the *Gibson* family to be so dedicated—in substitution for the original one. But a right once acquired by the public, in any line of road, cannot be so destroyed; and the old course near *Harley's*, even if the altered direction there were also dedicated, would remain. We doubt much, however, whether the circumstances justified the finding of such a dedication, at that spot; founded mainly, as it would be, on the mere fact that the occupier there had thought proper, by his own act, to compel a deviation. And there is this further difficulty in the case; that (as already explained) a portion of the line or course claimed, the user of which forms the trespass complained of, never was part of the public road—but merely formed the defendant's necessary means of access, and exit, to and from the road.

(a) 2 F. & F. 864.

(b) *ante*, p. 45.

Unless he will consent, therefore, to the abandonment of his verdict on the fourth plea, we must grant a new trial as to the issue on that plea.

1866.
GIBSON
V.
M'GEORGE.

On the second plea, however, we think that the verdict cannot be disturbed. In the year 1835, Dr. Gibson obtained a grant of the land south of *Harley's* farm, which we have spoken of as vacant; being the site of the deviation last mentioned, and of the trespasses committed by the defendant. Now at that time, all the land adjoining *M'George's* in every direction, *Brown's* and *Teece's* farms, *Warmby's*, and *Harley's* on the north and north-east, and *Gibson's* to the west—although this last does not affect the question,—had long been occupied and cultivated; and therefore, presumably, *granted*. But *M'George's* farm, although occupied in and before 1835, was not granted until 1839; up to which date, therefore, the Crown had in itself a legal right of access, over the said vacant but recently granted land, to *M'George's* farm. In other words, when the Crown granted that land to *Gibson* it reserved to itself, (possibly *eo instanti* for the benefit of *M'George*, as its locatee or tenant,) a right of convenient passage over the same land,—called away of necessity,—to and from *M'George's* farm. Even if the Crown had not, before 1835, actually granted out all the surrounding lands, we question whether this implied reservation of a right of passage, to *M'George's* farm, did not equally exist. For neither the Crown, nor *M'George*, could reach the latter's farm (unless over the newly granted land) without violating rights of his neighbours, equitably enforceable probably against the one, and legally enforceable certainly against the other.

As the case stands, however, on the evidence, we are clearly of opinion that the "right of way of necessity" existed in the Crown in 1835; and, if so, the same right passed by the grant of 1839 to the defendant. That right of way or passage would not, at either of those times, naturally be along the *old* highway, and thence to *M'George's* farm; for, as we have seen, the deviation or altered line then existed—and the right of which we

1866.
GIBSON
v.
M'GEORGE.

speak, being independent of any other, is measured by and co-extensive with the necessity which calls it into being. The actual highway in 1839 at and through *Harley's* farm, by his act, if not also with the plaintiff's assent, or her husband's, was along the line or course used by the defendant. He could not in 1835 or 1839 have passed over the original course, without cutting down *Harley's* fence; and, supposing that the defendant had done this, it would have been under a right or claim (well or ill founded) of highway. But the right which he exercised, after the year 1839, was a new right then conferred by his grant; a right of way of necessity, reserved by implication by the Crown, over the land parted with to *Gibson* in 1835—and which right passed to the defendant, by the grant of 1839. See *Pinnington v. Gallard* (a), and *Pearson v. Spencer* (b), confirmed on Appeal (c). That way would be the one *then* most convenient to use; and the jury were justified in finding that its course, (or, in other words, that the most convenient access to *M'George's* farm,) was in the then state of things from the new highway, at the termination of *Harley's* fence, across the plaintiff's land by the route or direction complained of.

Our judgment, consequently, subject to his election as to the fourth issue, is on the whole record for the defendant.

(a) 9 Exch. 12.

c) 3 *ibid* 767.

(b) 1 B. & Sm. 584.

1866.

MACDONALD *against* MURRAY (a).

TRESPASS for seizing and impounding cattle belonging to the plaintiff. Pleas—1. Not possessed. 2. That at the time when, &c., the defendant was lawfully possessed of a certain station or run called Moorabi, and because the said cattle were then wrongfully on the said run, *damage feasant*, the defendant seized, &c. Issue thereon.

At the trial, before *Wise, J.*, in August, 1864, the facts, as they appeared from the evidence, were as follows:—The run called Moorabi (whether more or less in extent) was occupied by *Nelson Lawson*, under whom the defendant claimed, in and long before 1847, under—as he alleged, and there was no reason to doubt,—a Crown license in that behalf. Claiming under that authority, *Lawson* in 1848 applied for a lease of the property; describing it by boundaries, which (as it seemed) included the tract in dispute, but representing the entire extent to be 32,000 acres—whereas, on investigation, the quantity of land was found to be in truth above 37,000 (or, as the plaintiff maintained, above 40,000) acres. When the fact of this excess was first ascertained, or by whom, or what was thereupon done, there was nothing to show. In September, 1848, the then Chief Commissioner advertised this application in

In an action of trespass for seizing and impounding cattle *damage feasant*, one question being, whether the land where the seizure was made legally formed part of the defendant's run called M., or was properly part of an adjoining run, called B., of which a lease had been promised to the plaintiff; and a second question being, whether the defendant had received a similar promise within s. 28 of the Crown Lands Occupation Act of 1861, applicable to the particular area, it appeared that the run called M. was

occupied by the defendant in and before 1847, under a Crown license, and that he in 1848 applied for a lease of the property, describing it by boundaries which included the tract in dispute, but representing the entire extent, which was actually above 37,000 acres, to be 32,000 acres; and that this application was notified in the *Gazette*, favorably reported on in 1849 to the Chief Commissioner, and from that date up to 1863, the estimated rent on 32,000 acres had been paid. It appeared also, that in September, 1857, the plaintiff tendered as for a new run for 16,000 acres, of which the disputed tract formed a part, under the name of B. The local Commissioner having reported favorably, the plaintiff's tender was accepted, and a lease promised to the plaintiff by letter, under the Chief Commissioner's hand. The jury having found that there was no promise of a lease of the disputed area to the defendant, the Court, on motion for a new trial, refused to disturb the verdict. The promise to the plaintiff gave a title to the area in question, notwithstanding the defendant's possession of the same, unless the defendant could support it by adequate evidence of a prior promise embracing the same land.

(a) Before *Stephen, C. J.*, *Hargrave, J.*, and *Fauvelt, J.*

1866.
 MACDONALD
 v.
 MURRAY.

the *Gazette*, which had the usual clause that the Government did not "pledge itself to the issue of a lease in any case, until due enquiry had been made into the validity of the claim" (a). But, in September, 1857, the plaintiff tendered as for a new run for 16,000 acres, of which the disputed tract (said to be 5000 acres or thereabouts) certainly formed part, under the name of Bogala. Then came a report from the local Commissioner, that the land comprised no other under lease or license; and in 1861 the tender was accepted; and a lease specifically promised to the plaintiff, by letter under the Chief Commissioner's hand. At the trial, it was arranged that the evidence should be taken on both sides as if the pleadings allowed the 28th section of the Crown Lands Occupation Act of 1861 to be available on both sides. The jury found that there was not any promise, engagement, or contract between the Crown and the defendant's predecessors for a lease of the place in question, and that they were not in licensed occupation of the land in question at the time of the application in 1848. They therefore gave a verdict for the plaintiff, with £1200 damages.

September 5,
 1864.

Sir W. Manning, Q. C., having obtained a rule *nisi* for a new trial (b),

March 21,
 1866.

The *Attorney General* (Stephen with him) for the plaintiff, showed cause. There was no licensed occupation by the defendant; but certainly no promises since the date of the Orders in Council either to the defendant or to Lawson, through whom the defendant claims; and this Court has expressly held that the 28th section of the Crown Lands Occupation Acts of 1861 only gives effect to promises made after the Orders in Council came into operation; *Blackman v. Mylecharane* (c). By the Order in Council, dated 7th October, 1847, the six months within which, by s. 11 of ch. ii. of the Regulations, occupants were entitled to demand leases of their

(a) The form of notice will be found in 4 Sup. Ct. R., C. L. 45, note (a).

(b) Before Stephen, C. J., Hargrave, J., and Faucett, J.

(c) 4 Sup. Ct. R., C. L. 43.

respective runs, expired on the 7th April, 1848; and in February 1848, *Lawson* applied by tender for 32,000 acres. But the land on which the impounding took place was not within this area; *Blackman v. Mylecharane* (a) shows that even assuming that this application and its publication in the *Gazette*, coupled with the subsequent licenses and payments of rent were unitedly some evidence of a promise under the 28th section of the Crown Lands Occupation Act of 1861 as to this 32,000 acres, they were no evidence whatever of such a promise as to this 16,000 acres within which these animals were impounded. But it is submitted that not only was there no license or promise to the defendant, but there was clearly a promise to the plaintiff. In September, 1857, the plaintiff tendered for 16,000 acres under the name of Bogala, of which this disputed block certainly forms a portion. A merely licensed occupation is of no moment. If the defendant had such prior occupation, the plaintiff's promise of a lease is conclusive. The defendant certainly had no prior promise of a lease; in fact he never had any under the 28th section of the Crown Lands Occupation Act.

1866.
MACDONALD
v.
MURRAY.

Sir *W. Manning*, Q. C., contra. *Lawson* was in licensed occupation. He applied for a lease by a description which included the *locus*. The description will doubtless give 37,000 acres or more, but the excess of 5000 acres was within the words "more or less." It cannot fairly be suggested that the applicant sent in a dishonest measurement. This application was produced from the official depositary enclosed in the official report of the Crown Lands Commissioner, dated 1849, and it does not contain any lands previously licensed. He had long been in licensed occupation of the whole, and therefore was under the Order in Council "entitled" to the lease demanded. The Order in Council recognized his right to a lease; and the Order was by the superior authority of the Queen in Council, and, therefore, equivalent to the authority of a statute. The duty of

(a) 4 Sup. Ct., R. C. L. 43.

1866.
 MACDONALD
 v.
 MURRAY.

the Governor was only ministerial. The Crown advertised the defendant's application. No caveat was put in. Reference was made to the Crown Lands Commissioner and he reported in favor of the application. Is not all this, with *Lawson's* payment afterwards from year to year of his annual rent proof of a promise of a lease to him? [*Stephen, C. J.* But is it not subject to curtailment as to any excess? The notification in the *Gazette* states that "the validity of the claim" shall be enquired into]. The description clearly included the *locus in quo*, and the rent was paid and received for Moorabi as described. It is contended, therefore, that the Crown could not afterwards effectually promise this plaintiff a lease of any part of the same land. It appears that in 1857 the plaintiff applied for a run of land, not describing the *locus*. In June, 1860, he obtained a promise of it by contrivance of some sort. Can this defeat the defendant's previous occupation and promise? It is submitted that a bill for specific performance would have lain to enforce the contract on the faith of the acts and documents on which the defendant relies; *Fryon Specific Performance* (a). The Crown cannot derogate from its own grant; *The Company of Free Fishers of Whitstable v. Gann* (b). It is contended that the subsequent promise to the plaintiff is invalid against the defendant's vested right as a licensed occupant under ch. ii, s. 11 of the Orders in Council, and s. 2 of the Constitution Act, 18 & 19 Vic., c. 54, and the plaintiff's tender for a run and promise thereon are themselves inoperative, at all events, as against the defendant, the *locus* not being either forfeited or vacant land, or land never licensed. The prior promise to the defendant defeats the subsequent one. *Richards v. Whitford* (c) was referred to.

Cur. adv. vult.

May 16, 1866.

Judgment was now delivered as follows:—

STEPHEN, C. J. This was an action of trespass, for seizing and impounding cattle belonging to the plaintiff.

(a) p. 75.

(b) 32 L. J. C. P. 194.
 (c) 3 S. C. R., C. L. 110.

The defendant justifies the acts because the animals were (as he alleges) at the time wrongfully on his run called Moorabi. To this the plaintiff replied, taking issue merely on the plea ; thereby denying, simply, that the cattle were in fact on the said run—and on that issue, in terms, the question in dispute between the parties was tried. Now the defendant was, confessedly, in possession of the Moorabi run ; but the question was, in effect, whether the land legally formed part of that run, or was properly part of an adjoining run, of which a lease had been promised to the plaintiff, called Bogala.

That contest therefore involved, necessarily, this other ; namely, whether the defendant had received a similar promise, within the meaning of the Lands Occupation Act, section 28, applicable to the particular area. If so, such promise (it was conceded) must have been prior in date to the plaintiff's, and the defence would be established. The enactment, however, which makes the promise of a lease by the Crown, or its agents, equivalent in operation between litigating parties to an actual lease, contains words implying that every such promise must be *pleaded*. Hence it was mutually agreed, at the trial of the cause, and on the argument of the motion now to be disposed of, that all pleadings necessary to raise the point for decision should be considered on the record.

His Honor having stated the facts of the case as above, continued : Had *Lawson*, then, a previous promise of the same land ? The evidence as to this, it was contended for the defendant, was conclusive in his favor ; but it did not satisfy the jury. There was, it will be conceded, no direct proof of any promise. But in September 1848, the then Chief Commissioner advertised his application ; and it cannot be denied that, if such an application be regular, and founded on a licensed occupation, every such applicant is under the Order in Council entitled to "demand" a lease, coextensive therewith. Nevertheless, an applicant's occupation may in a general sense have been licensed, and yet the Crown not be pledged to the actual extent, or area, (often unknown to its officers,) occupied by him. For no Crown license, it

1866.

MACDONALD
V.
MURRAY.

1866.
MACDONALD
V.
MURRAY.

is well known, defines either area or acreage; and the licensee's application for a lease, as the form shows, is only his own estimate of that acreage. But the amount of assessment, which forms the consideration for the lease, depends entirely on the "grazing capabilities" of the run; and therefore, in a great degree, on its area or number of acres.

Now here the *Gazette* notification itself, certainly in terms, contains no promise. It has the usual clause, that the Government will give no pledge until the "validity of the claim" shall have been inquired into. On the other hand, the official report on *Lawson's* claim to the Chief Commissioner, in 1849, was favorable; and, from that date up to 1868, the estimated rent (but apparently on 32,000 acres only) continued to be paid. The jury thought, that all this did not prove the promise of a lease; a promise, at any rate, of the area or tract in question. They found, accordingly, that there was no such promise. The jury found, also, that the defendant's predecessor had not a licensed occupation, in 1848, of that tract or area.

The motion was for a new trial, on the ground that these findings, and the consequent verdict for the plaintiff returned thereon, cannot be sustained. And we have no doubt that, if the finding as to *Lawson's* licensed occupation refers to his whole run,—if, in other words, that finding be not restricted to the quantity occupied in excess,—the verdict on that part of the case was wrong. Assuming an excess in the occupation, a question of no easy solution would arise; namely, assuming *Lawson's* license to cover only 32,000 acres, but 37,000 or more to have been occupied under colour of it, what particular 5000 acres were to be excluded. Had the Crown the privilege of deciding? If, however, the first finding be correct or can be supported, to its full extent, (that is to say, if there was not sufficient evidence of a promise to *Lawson*, whatsoever, to satisfy the statute,) the second finding obviously need not be considered. Before expressing an opinion on that point, we will state the effect of the two cases decided in this Court, to which our attention was called during the argument.

In *Richards v. Whitford*, (a) which was an action for trespasses on a run or station called Yaraldool, occupied by the plaintiff, the defendant pleaded the promise of a lease, made to him in 1861 by the then Chief Commissioner;—such promise relating (nominally) to a new run, and including the area in contest, but that area having been in fact cut off, as an authorised excess, from the run occupied as Yaraldool. The promise was indisputably made to the defendant, on a tender sent in by him in 1859; the latter under the Order in Council, apparently, but the former under the recent Crown Lands Occupation Act. The plaintiff replied, that the same land was held by his predecessor, *James Smith Adams*, as part of Yaraldool, in and before the year 1847, under a license in that behalf; and that *Adams* obtained from the Chief Commissioner a promise of a lease thereof, under the Order in Council, in December 1850.

The fact was proved at the trial, that *Adams* applied for his lease in 1848, describing Yaraldool as extending in a certain direction five miles only. According to that description, the area or tract in question would be excluded. But, a dispute having arisen in 1849, between *Adams* and the defendant's predecessor, as to one boundary of the station, it was referred by the Government to a Boundary Commissioner; who, in settling that dispute, sent a description of Yaraldool, which by mistake gave it, in the direction alluded to, a length of fourteen miles instead of five. The Chief Commissioner of Crown lands, upon this report, wrote a letter to *Adams* by authority of the Governor, in December 1850, approving of the described boundaries, and promising a lease of Yaraldool in accordance with them. Shortly afterwards, *Adams* sold his interest in the property to the plaintiff; whose occupation, as well as that of *Adams*, it appeared, was always coextensive with the mistaken description. In 1852 the Chief Commissioner discovered, and wrote to the plaintiff to apprise him of the mistake; but nothing more seems to have been done

1866.
MACDONALD
V.
MURRAY.

(a) 3 Sup. Ct. R., C. L. 121.

1866.
MACDONALD
v.
MURRAY.

in a view to its correction. The tender by the defendant in 1859, however, being as for a new run, a lease of the excess was (as already stated) promised to him. There was no dispute at the trial respecting the intended duration of the term in either case.

The sole question in *Richards v. Whitford* was, therefore, there being thus two distinct promises, one under the Order in Council, and one under the Occupation Act, which of them took effect. And the Court held that, as every such promise operates by the statute (between litigating parties) the same as if a corresponding lease from the Crown had actually issued, the first promise or lease necessarily excluded, by forestalling and therefore vitiating, the second. The Chief Commissioner was clearly recognised as an agent of the Crown, lawfully authorised to make any such promise. The Court held, moreover, that the Governor has power effectually to promise, and legally to execute a lease, under the Order in Council, although the party promised might not under the same Order be entitled to demand such lease.

In *Blackman v. Mylecharane*, on the contrary (a), the decision turned on very different points. The plaintiff there was in possession of the run, on which he complained that the defendant had trespassed; and it appeared that the former (or rather his father, from whom he claimed) occupied the entire tract in and before the year 1847. But he applied for his lease, by a description which might or might not include the disputed area; and stated that the land applied for comprised only 16,000 acres, whereas that which the father and son so occupied was above 68,000. The difficulty was, to show that this application had been complied with; for, although in 1848 it was advertised, and favourably reported on, and rent was from time to time received as for a run of the ascribed name, no distinct promise of a lease was shown—still less a promise to the extent of 68,000 acres, on an application for 16,000 merely.

(a) 4 Sup. Ct. R., C. L. 43.

The Government, having discovered in 1856 that the plaintiff's occupation embraced so enormous an excess, accepted a tender for 30,000 acres of it as a new run, from one *Morris*; and from the latter, the defendant purchased the same. There was no question raised, as to the existence in fact of the promise to *Mylecharane*, consequent on his tender, or that the 30,000 acres included the area entered upon by him, but which was claimed as having previously been promised to *Blackman*. The whole case turned on this, that the plaintiff had failed to establish, by sufficient evidence, the promise so relied on by him.

1866.
MACDONALD
v.
MURRAY.

On that ground, the Court set aside the verdict which had been obtained by the plaintiff. It appeared that *Blackman*, the father, had received only the usual acknowledgement by notification in the *Gazette*, as in the present case, that his application was received; and this notification, in the opinion of the Court, conveyed no absolute promise of a lease. If, however, the announcement—with the acceptance of rent—amounted to a promise, the Court further held that a promise of 16,000 acres could not, under the circumstances, be taken to include the 68,000 occupied, nor any specific 16,000 acres out of that quantity. The precise 16,000 acres promised, therefore, or supposed so to have been, were left uncertain; and the plaintiff consequently could not recover, as against the defendant, holding the specific promise of a lease thereof, for any entry on the land in question.

The acceptance of rent from *Blackman*, it may be observed, which ordinarily would indicate the existence of a lease, is in this colony equally referable to occupation under a license; and, at any rate, it could show only that *some* land was rented (under lease or license) to the plaintiff, bearing the name assigned to the run—but not that any particular extent or area was rented. If any, however, the amount paid would tend to show a small area, rather than so very large a tract as that contended for.

The points decided in those cases, unless we were prepared to overrule them, will go far to determine the

1866.
MACDONALD
V.
MURRAY.

present. The description of *Blackman's* run, it is true, was indistinct; so that the entire tract occupied, (and doubtless under colour of a license, as here,) might possibly not have been within the ascribed boundaries. But the Court was of opinion, that a promise within the meaning of the statute is not shown, merely by the publication of the licensee's application; even though followed—as in the case of this defendant or his predecessor,—by continuing possession, and the payment of rent. And here the jury have expressly found, as a fact, that there was no such promise.

If, as in *Whitford's* case, a clear promise to the earlier occupant had been shown, although by a blunder covering a much larger extent of country than was originally intended, the enactment would have operated to give that promise effect—as between the individuals litigating. The *Crown* is not bound, (not conclusively, at least,) by any such mistaken instrument; but then the proper course must be taken, to defeat or correct it. As between parties claiming under a Crown promise, the very summary process of in terms cancelling the first, and then making an inconsistent second promise, cannot since the statute avail anything. But the plaintiff in this case proved a distinct and specific promise to himself, of the land on which his cattle when seized were grazing. He had a right therefore to place them there, notwithstanding the defendant's mere possession; unless the defendant could support it, by adequate evidence of a prior promise embracing the same land. His possession of that spot, or of the entire run, if licensed, (as to which we have already distinguished between a license for the station, generally, and a license covering the particular place), may have entitled him to a lease; but nothing is equivalent to one, except the actual deed itself, or the promise of such a lease—operating by the statute as a deed, and therefore taking effect, where two or more exist in conflict, each according to its priority.

On the whole, the jury having negatived the existence of any such promise to the defendant, and that finding being in accordance with the apparent justice of the case, and not opposed by the evidence, we decline to disturb

their verdict. The rule obtained by the defendant, therefore, is dismissed with costs.

1866.
MACDONALD
v.
MURRAY.

I am to add for Mr. Justice *Faucett*, that he entirely concurs in the judgment thus delivered.

HARGRAVE, J. The present case seems to me, in a great measure, to be controlled by the recent decision of the full Court in *Blackman v. Mylecharane (a)*, in which it was held that, even assuming that the usual application for a lease, and its publication in the *Gazette* were followed by a subsequent license and payment of rent upon the grazing capabilities, and a limited area specially mentioned in the application, such facts would not be evidence of a promise as to such limited area; and were no evidence of any promise as to a much larger area of 68,500, as contained in the general boundaries or description of the run.

After this decision of the full Court, I always considered the law as to these old licenses to be quite settled, viz.:—That where the licensee's estimate of grazing capabilities has been far below the actual facts, and where the payments of small rents on limited areas have been long continued, a quasi-retributive construction arises from these facts and details, upon the whole license; whereby the vast geographical or natural boundaries of many such old licenses becomes in law limited to such limited areas; and the license does not necessarily extend to the large excessive areas as covertly claimed in the original application. Consequently the Crown can lawfully issue less extensive licenses of small runs or sections carved out of such excessive areas in specified localities at additional rents under the present regulations.

It is upon these principles, in which I fully concur, that in the present case the jury appears to have found, on the one hand, that evidence as to an application, &c., in 1848, and subsequent payment of rent upon a limited area of 32,000 acres in respect of a station called Moorabi, were insufficient to establish a promise as to an enlarged

(a) 4 Sup. Ct. R. C. L., 43—51.

1866.

MACDONALD

v.

MURRAY.

area of 37,000 or 40,000 acres, the 5,000 or 8,000 acres of which in excess might or might not, therefore, be actually the *locus in quo* of the trespass; which *locus* was, on the other hand, clearly established by the plaintiff to be included by the Crown in the subsequent promise of 1861, as within the defined boundaries of such promise, *as well* as within his limited area of 16,000 acres.

I see nothing in the case of *Richards v. Whitford (a)*, to militate against this view of the finding of the jury in the present case, and I therefore think that the application for a new trial ought to be refused with costs.

Judgment accordingly.

March 23.

THE QUEEN *against* HARRIS.

A person who had become insolvent intentionally, omitted a horse and cart from his schedule, with intent to defraud his creditors. But he afterwards, at his second meeting, disclosed the fact of his having this property. *Held*, that he was rightly convicted of fraudulent insolvency, under the 73rd section of the 5 Vic., No. 17.

Under the third section of the Insolvency Amending Act of 1855, 19 Vic.,

No. 33, no statement made by an insolvent on his examination in the Insolvent Court is admissible in evidence against him, on the trial of any indictment other than an indictment for perjury.

SPECIAL case reserved under the 13 Vic. No. 8.

“The prisoner was tried before me at the present Sittings of the Criminal Court at Darlinghurst, upon a charge framed under the 73rd section of the Insolvency Act, 5 Vic., No. 17, of embezzling, concealing, retaining and removing a horse and cart, with intent to defraud his creditors.

“It appeared that the prisoner in the schedule first filed by him had omitted to insert the horse and cart, the subject of the information, but had afterward, in an amended schedule, filed before the second meeting of his creditors, inserted a horse and cart.

“Counsel for the prisoner contended that after so doing, he could not be said to have concealed the property, and that the privilege which the prisoner had of filing an amended schedule afforded him a *locus penitentiæ*. I, however, held that the circumstances would not relieve the prisoner from the charge, and that there was no such *locus penitentiæ*.

(a) 3 Sup. Ct. R., C. L., 110.

"In the course of the case for the Crown two witnesses were examined as to statements made by the prisoner in the course of his examination in the Insolvent Court. To this line of argument counsel for the prisoner objected, contending that nothing said by the Insolvent during his examination could be given in evidence against him upon the present charge. I, however, overruled the objection and admitted the evidence.

"The questions for the opinion of the Court are whether I was right in the above decisions.

"Dated this 15th day of March, A.D. 1866.

ALFRED CHEEKE."

Windeyer for the prisoner. No man can be compelled to criminate himself. An insolvent is allowed to be examined for the benefit of his creditors, but not to be tortured into condemning himself. The qualification attached to the provision contained in the 22nd section of the 7 Vic., No. 19, (a) rendering the examination of an insolvent inadmissible by the words "except for the purposes of this Act only," is altogether got rid of by the language of the 3rd section of the 19 Vic., No. 33 (b), which says absolutely that such evidence shall not be given.

The Act allows an insolvent to amend his schedule, and therefore allows the insolvent a *locus penitentiae*. The circumstance that these particular goods were contained in the amended schedule disproved the existence of any fraudulent intent on the part of the defendant.

The *Solicitor-General* for the Crown. As to the second point there is nothing to show that the horse and

(a) The 7 Vic., No. 19, s. 22, enacts that no question put to an insolvent in any examination before the Court or Commissioner "shall be deemed unlawful by reason only that the answer thereto may expose him to punishment under this Act: Provided that no such examination or any answer thereto shall be admissible in evidence against such insolvent, (other than on a prosecution against him for perjury) except for the purposes of this Act only."

(b) The 19 Vic., No. 33, s. 3, provides that, "no examination or answer of the person charged with any indictable offence under the provisions of the Insolvent Act in force for the time being shall be admissible in evidence against him on the trial of any indictment other than on a prosecution against him for perjury."

1866.
The QUEEN
v.
HARRIS.

1866.
The QUEEN
v.
HARRIS.

cart contained in the amended schedule are the same as those concealed; *R. v. Walters* (a), in which *Parke*, B., held that a bankrupt could not be indicted under the 32nd section of the 6 G. IV., c. 16, for concealing his books until after he had passed his last examination, is in favour of the present objection. But that case has been distinctly overruled, *Parke*, B., assenting, by the Court of Exchequer in *Courtivron v. Meunier* (b). *Pollock*, C. B., says in giving judgment—"On examination of the subject, it appears to me that what was said in *R. v. Walters* is not law." And *Alderson*, B., says: "If the words 'remove and embezzle' be read in connection with the word 'conceal' the idea of a *locus penitentiae* would never occur; for, though a person may continue to conceal, it is difficult to see how he can continue to remove, or continue to embezzle." This is an express decision on the point.

The 19 Vic., No. 38, must be construed in connection with the 7 Vic., No. 19, both statutes being *in pari materia*, and effect must be given to the concluding part of the 22nd section of the 7 Vic., No. 19; within which words it is clear the present case is included. [*Stephen*, C. J. The examination may be used by us for the purposes of the Act so as to apportion the punishment due to the insolvent, but is it so used when used in support of an indictment against him?] Whether or not this evidence was admissible, there remained ample materials to support the conviction. [*Stephen*, C. J. In *R. v. Yeadon* (c), which was a reserved criminal case, the Court held that there had been a mistrial, and granted a *venire de novo*.]

STEPHEN, C. J. It appears that the defendant intentionally omitted a horse and cart from his schedule, with intent to defraud his creditors. But he afterwards, at his second meeting, disclosed the fact of his having or being entitled to this property. In truth, however, he had before his schedule set up a pretended sale of it. I

(a) 5 C. & P. 138.

(c) 31 L. J. M. C. 70.

(b) 6 Exch. 79.

am of opinion that the prisoner has not the *locus penitentie*, which has been claimed on his behalf, and that any repentance after he has committed the offence is matter only for the consideration of the Judge. It is clear that the subsequent disclosure could not make the previous concealment, which was in fact a removal, or founded on one, less a fraud, although the disclosure, if for an honest purpose, may operate on the question of punishment. If an insolvent deliberately makes away with some of his property, with intent to defraud his creditors, his afterwards inserting it in his schedule does not condone his offence. I believe that this Court has already decided this very point in a case in which *R. v. Walters*, which I now see has been overruled in England, was relied on (a).

On the second point as to the admissibility of the prisoner's examination in the Insolvent Court, it appears that the only objection at the trial was based on the 22nd section of the 7 Vic., No. 19; and if that were the only section relating to the subject, I should think the evidence admissible. The law in England is that a statement made by the party upon oath, while a prisoner

1866.
The QUEEN
v.
HARRIS.

(a) In *R. v. Hughes*, 1848, this point was decided as appears from the following extract from the judgment:—"Mr. *Lowe* submitted, on the authority of the case of *Rex v. Walters**, that the offence of removing or concealing could not be deemed complete, until after the third meeting should have been duly held, and the examination of the insolvent finally concluded." Then after commenting on *R. v. Walters* and *Evans*' case† it continues:—"But the provision in our local Act, under which the indictment in this case is founded, (5 Vic. No. 17, s. 73,) is couched in very different terms. It appoints no stated time for the insolvent's discovery of his property; but makes him guilty of a misdemeanor, if he shall have embezzled, concealed, retained, or removed, any part of his estate, with intent to defraud his creditors, *whether before or after his insolvency*. It is true, that by another section (the 65th), the insolvent is to attend the second meeting; and that, if then required, he is to deliver a true inventory of his property, debts, books, and writings;—and, by s. 73, he is rendered guilty of a misdemeanor, if such inventory be wilfully false in any particular. That inventory, however, may never be required; and if not required, how is the act of previous concealment or removal affected? But, whether required or not, it seems that the act would equally have been complete. The offence existed, we think, at the moment of perpetration, in and by the act itself. There is nothing in either of the two clauses, that we can discover, which supports an inference to the contrary, and the words themselves, in the section creating the offence, admit of no construction but one."

* 5 C. & P. 142.

† Ry. & Mood., 71.

1866.
The QUEEN
v.
HARRIS.

under examination, respecting the criminal charge, is not admissible. "But," as is laid down by *Taylor* (a), "if a prisoner, on being examined as a witness, has consented to answer questions, to which he might have demurred, as tending to criminate himself, and which, therefore, he was not bound to answer, his statement is voluntary, and, as such, may be subsequently used against himself for all purposes, unless he be protected by the special language of a statute;" and accordingly a deposition was admitted by *Cockburn*, C. J. "against a prisoner who had made it before justices while under examination as a witness, and who in consequence of its self-criminating character, had been committed to take his trial." "Although," continues Mr. *Taylor*, "a prisoner cannot, at common law, exclude his own confession, on the sole ground, that it was made by him while a witness under oath, yet, if he can prove that, when questions tending to criminate him were put, he had claimed the protection of the Court, and has still been illegally compelled to answer, his answers cannot be given in evidence against himself." Such being the law, our Insolvent Act (b) provided that an insolvent shall be compelled to answer "any lawful question," but left open what question was lawful. The 22nd section of the Insolvent Amending Act (c) enacted that no question is to be deemed unlawful "by reason only that the answer thereto may expose him to punishment under this Act." It seems therefore that if the answer to the question might expose him to punishment under the former Act, the 5th Vic., No. 17, he could refuse to answer such question, and if he claimed his privilege, the answer, if made, could not be given in evidence against him. But if, on the other hand, he choose to answer, the evidence would then be admissible against him. Another statute however has been passed, the 19 Vic., No. 33, the 2nd & 3rd sections of which provide that "nothing in this Act shall alter the liability of the Insolvent or any other person to answer all questions which may be lawfully put under the provisions of the

(a) § 821.

(b) s. 69.

(c) 7 Vic., No. 19.

Insolvent Acts in force for the time being. Provided, however, that no examination or answer of the person charged with any indictable offence under the provisions of the Insolvent Acts in force for the time being, shall be admissible in evidence against him on the trial of any indictment other than on a prosecution against him for perjury."

1866.
The QUEEN
v.
HARGREAVE.

This is a general enactment (without any qualification like that introduced into the 7 Vic., No. 19) that no examination of an insolvent shall be admissible against such insolvent on any information whatever. The section is drawn incautiously, and prevents any examination of an insolvent whatever being admissible, even although the evidence has been given voluntarily, and without any privilege being claimed. I am of opinion, therefore, that the evidence here was wrongly received. If the case had been from Quarter Sessions there would have been a *venire de novo*, but as it is from our own Court, there will be a new trial.

HARGRAVE, J., and CHEEKE, J., concurred.

THE QUEEN *against* HUGHES (a).

September 1,
1865.

SPECIAL case under the 13 Vic., No. 8.

The defendant was charged for that he "being insolvent," unlawfully, &c., with intent to

The defendant was charged and convicted before *Cheeke, J.*, in July 1865, with fraudulent insolvency. The information, after alleging that on the 28th February,

defraud *W. S. L.* and others, the creditors of the defendant did embezzle, retain, and remove a certain portion of his estate, &c. *Held*, that, upon an information so framed, the order for sequestration of the defendant's estate, under the hand of the Chief Commissioner, was under the 107th section of the 5 Vic., No. 17, and the 25 Vic., No. 8, s. 4, sufficient proof of the sequestration.

Held, also, that it was not necessary to shew that the creditors intended to be defrauded were creditors who had proved; but that it was sufficient to shew an intent to defraud creditors generally.

The defendant had contracted to build a bridge for the Government. *W. S. L.* superintended the contract for him. The latter had advanced money to pay the wages of the men engaged on the contract, on condition, that when the money was paid by Government on account of the contract it should be lodged to his credit, to be expended, in the first place, in paying the men's wages then due, and the balance to be retained by *W. S. L.* to repay himself his advances. Two cheques having been received by the defendant from the Government, and the proceeds embezzled, *Held*, that they were properly described in the information as a portion of the defendant's estate.

(a) Before *Wise, J.*, *Hargrave, J.*, and *Cheeke, J.*

1865.
The QUEEN
v.
HUGHES.

1865, at Sydney, &c., the defendant *Hughes* "being insolvent," his estate "was duly surrendered and ordered and adjudged to be sequestrated," charged that the defendant, before his estate was sequestrated, on the 8th of February, 1864, "unlawfully, wilfully, and fraudulently, and with intent to defraud one *W. S. Lockhart* and others (the creditors of the defendant), did embezzle, retain, and remove a certain portion of his estate, monies, effects and credits, to the value of forty shillings, &c."

The defendant pleaded not guilty and was defended by *Martin*, Q. C. It appeared that the defendant had contracted to build a bridge at Singleton for the Government. He resided in Sydney, and one *Lockhart* superintended this contract for him. *Lockhart* agreed to advance the necessary funds to pay the men's wages, on condition that when the money was paid by the Government on account of the contract, it should be lodged to his credit in the Joint Stock Bank. The amount was to go first to pay the wages of the men then due, and if there was any balance it was to be retained by *Lockhart* to repay himself his former advances. He had also a bill of sale over the whole of the defendant's plant. The defendant never paid the men personally, and knew nothing of the accounts.

In February 1864, two cheques, one for £100 and another for £1052, were paid to the defendant, and he asked one *Coghlan* to get them cashed. They were accordingly cashed by *Coghlan* at the Bank of New South Wales, and the bank notes thus obtained were given to the defendant, who proceeded with them from Sydney to Singleton to pay the men. On his way, he stopped at Newcastle, and when there, he first discovered, as he said, that the bank notes were missing. It was the embezzlement of this money that was the subject of the present information. In order to prove the sequestration, the petition, schedule, and order of sequestration were put in evidence, and the defendant's signature thereto proved. The special case concluded as follows:—

"At the close of the case for the Crown, the defen-

dant's counsel submitted that there was no case to go to the jury, for the following reasons:—1st. Because there was no proof of the sequestration of the defendant's estate, inasmuch as the information did not allege that the defendant was insolvent within the meaning of the Act 5 Vic., No. 17, but merely that he was insolvent, and there was not, without the aid of the 107th section of the said Act, evidence of such sequestration. It was contended that, independently of that section, it was in the case of a voluntary sequestration necessary to prove that evidence by affidavit or otherwise, on oath, was taken by the Chief Commissioner, and that on such evidence he was satisfied of the petitioner's insolvency, whereas it did not appear that there was any affidavit or other evidence, on oath, before the Commissioner when he accepted the surrender and made the order of sequestration.

"2nd. Because there was no evidence of the insolvency, in point of fact, of the defendant at the time of the alleged concealment. It was contended that it was necessary that such insolvency should be proved to support the information.

"3rd. Because there was no evidence that any creditors had proved in the defendant's estate. It was contended that without such evidence the information could not be sustained.

"4th. Because there was no evidence to go to the jury in support of the charge of embezzlement, concealment, retention, or removal contained in the information.

"5th. Because there was no evidence that the £1150 alleged to be concealed ever formed part of the defendant's estate. It was contended that, on the contrary, the evidence shewed that that sum, at the time of its receipt by the defendant, belonged equitably, if not legally, to one *William Spence Lockhart*.

"After consultation with his Honor the Chief Justice, I declined to withdraw the case from the jury, and reserved the points submitted to me. The questions, therefore, for the determination of the Court are, whether

1865.
The QUEEN
v.
HUGHES.

1865.
 The QUEEN
 v.
 HUGHES.

all or any of the points submitted as above on behalf of the defendant are valid.

"Dated this fourteenth day of July, in the year of our Lord one thousand eight hundred and sixty-five.

ALFRED CHEEKE."

Martin, Q. C., for the prisoner. The information is good; but framed as it is, it is submitted that the Crown cannot avail itself of the 107th section of the Act (*a*), as that section only applies where the defendant is alleged "to be insolvent within the meaning of this Act," and was inserted in order to get rid of technical difficulties in proving the sequestration, and all the acts which render it a valid sequestration. The third section (*b*) of the Act provides that a Judge shall either direct the petitioner to appear before him to be examined touching his insolvency;—or may receive proof thereof by affidavits—or he may direct the petitioner to appear before any Commissioner, and direct such Commissioner to

(*a*) This section enacts—"That in all suits or actions, and in all indictments or informations under this Act, where it shall be necessary to allege or prove that any party became or was insolvent, or that his estate was surrendered or sequestered as insolvent, or ordered or adjudged to be so sequestered, it shall be sufficient merely to allege that such party, being insolvent within the meaning of this Act, his estate was ordered or adjudged to be sequestered, without setting forth such adjudication, or any order for such sequestration, or setting forth or proving any petition presented in the matter of the insolvency, or any petitioning creditor's debt, or meeting of creditors, or other proceeding under this Act; and proof of such adjudication or order, by the production thereof, or of any office copy thereof, under the hand of the Judge or officer signing the same, shall (on proof of such signature and of the identity of the party therein named as insolvent) be sufficient for the purposes of such allegation."

(*b*) This section enacts—"That from and after the first day of February next, it shall and may be lawful for any Judge of the Supreme Court of the said Colony, upon the petition, in writing, of any person, setting forth that he is insolvent, and desirous of surrendering his estate for the benefit of his creditors, either to direct such person to appear before him, to be examined touching his said insolvency, or to receive such other proof thereof, by affidavits of the said insolvent and others as to the said Judge may seem fit; or to direct such petitioner to appear before any such commissioner as aforesaid, and to direct such commissioner to examine the petitioner in manner aforesaid, and to take proof of the matters aforesaid; and it shall and may be lawful for any Judge of the said Supreme Court, on considering the report of any such commissioner, or upon proof of the matters aforesaid, to his satisfaction, to accept the surrender of such estate, and by order under his hand to place the same under sequestration in the hands of the Chief Commissioner in and for that part of the colony in which such insolvent shall reside."

examine the petitioner, and take proof, &c., and the Judge may then, either on considering the report of the Commissioner, or upon proof of the matters aforesaid to his satisfaction, accept the surrender of such estate, and order it to be sequestrated. The 25 Vic., No. 8, s. 4, gives the Chief Commissioner the powers of a Judge. All that could formerly be done by a Judge can now be done by the Chief Commissioner, but all that is required to be done must be done. There must be "proof of the matters aforesaid." Proof is the result of testimony, the effect of evidence; *Taylor* on Evidence (a). By the common law evidence, except in cases specially excepted, must be on oath. A Peer sitting in judgment gives not his verdict upon oath, like an ordinary jurymen, but upon his honour (b). He answers also to bills in Chancery upon his honour, and not upon his oath; *Mears v. Lord Stourton* (c). But when he is examined as a witness, either in civil or criminal cases he must be sworn, (whether in inferior Courts or in the high Court of Parliament) for the respect the law shows to the honour of a Peer does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis*; *Mears v. Lord Stourton* (d), cited in *Taylor* (e), *Starkie* (f), and *Phillips* (g). Here it was necessary to prove that evidence on oath had been taken before the Chief Commissioner. These preliminary proceedings are required by the Insolvent Act, for the protection of the creditors, and it is only when these things are done that the Judge has power to order the sequestration of the estate. In the words of *Coleridge J.*, in *Christie v. Unwin* (h), "However high the authority may be, where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord High Chancellor, or by a justice of the peace, the facts which give the authority must be stated." In *R. v. Jones* (i), the indictment after stating that a commission of bankrupt

1865.
The QUEEN
v.
HUGHES.

(a) § 1. (b) 2 Inst. 49. (c) 1 P. Wms. 146.
(d) Salk. 512; Cro. Car. 64; 2 How. St. Tr. 772 (n).
(e) § 1245. (f) p. 22. (g) pp. 4, 12.
(h) 11 A. & E. 379. (i) 4 B. & Ad. 345.

1865.
The QUEEN
v.
HUGHES.

had issued against A., by virtue of which the commissioners adjudged him to be a bankrupt, charged that he and other defendants conspired to conceal a part of his personal estate ; and it was held, that under the then Bankrupt Act, 6 G. IV., c. 16, s. 112, such an indictment was bad, as not showing that the party had actually become bankrupt. Because on the face of it sufficient did not appear to show that there had been a valid commission. So in *R. v. Lands (a)*, which was an indictment framed under the 253rd section of the more recent Bankrupt Act, 12 & 13 Vic., c. 106, for fraudulently obtaining goods on credit, it was held to be necessary for the prosecution to prove the act of bankruptcy and other ingredients of bankruptcy ; and that proof of the adjudication was not sufficient. In *R. v. Massey (b)*, the indictment alleged that the defendant committed an act of bankruptcy "by being unable to meet his engagements with his creditors, and by filing his petition in the Court of Bankruptcy, for the B. district for adjudication of bankruptcy against himself," and that afterwards, on the said petition being filed, he was adjudged a bankrupt. The 79th section of the 12 & 13 Vic., c. 106, provides, that if a trader file a declaration that he is unable to meet his engagements, he shall be deemed to have committed an act of bankruptcy at the time of filing such declaration, provided a petition for adjudication of bankruptcy be filed within two months. The indictment was held to be invalid, for not stating that he had filed such a declaration. So here, there being no evidence by affidavit or otherwise, on oath, before the Chief Commissioner, the ingredients which are required to constitute a valid order of sequestration were not shown.

The 73rd section requires that the act should be done "with intent to defraud creditors." But to constitute a creditor, it is necessary that there should have been a proof and allowance of a debt against the estate. It was necessary, therefore, to show not only the particular intent, but also that the persons intended to be defrauded

(a) Dears. 567 ; 25 L. J. M. C. 14.

(b) L. & C. 206 ; 32 L. J. M. C. 21.

were persons admitted as creditors by the Chief Commissioner, or by this Court on appeal. It is submitted that it was not shown that there were any creditors who could be defrauded. If the law be not so, a person might be convicted of embezzling with intent to defraud creditors, although not a single creditor had proved ; and, although he would be entitled immediately to get back all his estate.

Lastly, there is no sufficient evidence that the money alleged to be embezzled formed part of the insolvent's estate. In order to support this information, it is necessary for the prosecution to show that the property alleged to be embezzled is the property of the insolvent both at law and in equity. But it is clear, according to the principles laid down in *Holroyd v. Marshall* (a), that the property in these cheques would in equity be considered to be in *Lockhart*. "If," says Lord *Westbury*, "a vendor or mortgagor agreed to sell or mortgage property, real or personal, of which he was not possessed at the time, and he received the consideration for the contract, and afterwards became possessed of property answering the description in the contract, there was no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired." Incapacity to perform the contract at the time of its execution would be no answer, when the means of doing so were afterwards obtained. By the arrangement between *Lockhart* and the defendant, immediately these cheques were given by the Government, they became the property of *Lockhart*. The defendant is charged with making away with his estate, the estate over which he had a disposing power, with intent to defraud his creditors. But it is submitted, that these cheques were not in equity part of the defendant's estate, and that they would have gone not to his creditors, but to *Lockhart*.

Butler for the Crown. In order to render the 107th section available, it is not necessary to allege in the in-

1865.
The QUEEN
v.
HUGHES.

(a) 33 L. J. Ch. 196.

1865.
 The QUEEN
 v.
 HUGHES.

formation that the defendant is insolvent within the meaning of the Insolvent Act, because there is no other Act in force in this colony by which a person can become insolvent. The cases referred to, *R. v. Lands (a)*, *R. v. Massey (b)*, and *Jones' case (c)*, were all under the Bankruptcy statutes, which only apply to a particular class of persons, persons liable to be declared bankrupt, and not generally to all persons, as our Insolvent Act; and it is, of course, therefore absolutely necessary to show that the offender is one of that particular class. This was a voluntary sequestration, and the petition which is the foundation of the proceedings being shown, it was necessary for the other side, in order to get rid of the presumption that all the necessary steps were taken, to produce evidence that such steps had not been taken. Under the Bankruptcy Act, also, certain things have to be done by persons other than the Judge, and before the Judge can act at all; and therefore the presumption in favour of the regularity and sufficiency of the proceedings is not as strong as in proceedings under the Colonial Act, where, immediately the petition is filed, the Judge is to act. [*Wise, J.* The decisions in Bankruptcy do not bind any other Court; but the decision of the Chief Commissioner in Insolvency is a binding decision, unless appealed from; a wrong decision ought to be got rid of by appeal]. Here the petition and adjudication was proved, and it must be presumed that all the intermediate steps have been properly taken. This Court has held that such a presumption exists with regard to the preliminary proceedings in insolvency; *R. v. Hart (d)*, *R. v. Garsed (e)*. In *Brenan's case (f)*,

(a) 25 L. J. M. C. 14. (b) 32 L. J. M. C. 21. (c) 4 B. & Ad. 345.

(d) April 13, 1849.—Fraudulent Insolvency.—The information was for lodging an inventory at the second meeting, containing a false statement of his estate.

Lowe, for the prisoner, argued certain points brought before the Judge after the prisoner's conviction.

Per Curiam. First, it is for the presiding Judge to decide, whether new evidence shall be received for the prosecution, to meet a defect or supply an omission. No proof was given of the sequestration order. On the objection being made, the Judge allowed a witness to be called to supply the proof.

Second, an inventory presented or filed before the second meeting, will be a lodging of it at that meeting, if it be then referred or used by the insolvent.

the return to a *habeas corpus* alleged that the prisoners were convicted of burglary by a competent Court, and sentenced to transportation, and the Court of Queen's Bench held that they must presume that the sentence being passed by a competent Court and unreversed, was warranted by law and valid.

It is also submitted that the creditors are not to be limited to those who have proved. The object of the statute is to punish fraud of every kind upon creditors generally, and will be construed so as to give effect to that object; *R. v. Manser* (g). The point was considered and decided in *Garsed's* case (e). On the last

1865.
The QUEEN
v.
HUGHES.

Third, the second meeting of creditors must be one duly called. But the Chief Commissioner in his evidence called this "the second meeting"; and stated that the insolvent then referred to and amended his inventory. It must, therefore, be taken *prima facie* to be the second meeting duly convened; because by s. 34, the Chief Commissioner, an officer of this Court—a public officer—is to convene it in a particular manner; and the Court will presume, therefore, that he did this duty in this particular by so convening the meeting.

(e) 19 April, 1859. — Special case. Several points reserved. 1st. Whether the words "*Thomas Bellew* and others," were parcel of the issue. The charge in the information is, that the act was done with intent to defraud. "*Thomas Bellew* and others his creditors." 2nd. Whether the documents certified by the Chief Commissioner were properly received; there being several erasures and interlineations on their face, which may or may not have been made by some one else—and possibly after signature by the Chief Commissioner; *Taylor on Evidence*, § 1606.

The Court held, first, that the charge was substantially that the prisoner did the act with intent to defraud his creditors; and that it was not necessary to prove *Bellew* to be a creditor. Secondly, that as it would have been an offence (a forgery) at the Common Law to alter in any material particular the certificate of the Chief Commissioner, it must be presumed that the erasures and interlineations were made before his signature.

On other points reserved (but on which the Court did not call on the Attorney-General, who appeared for the Crown), it held as follows: That it was sufficient for the Crown to give evidence from which a general intent to defraud the prisoner's creditors might be inferred, without showing and without the jury being able to discover what was the particular mode of defrauding. Also, that the creditors to be defrauded need not be creditors who shall *prove* their debts, but that the enactment was meant to apply to all the creditors existing at the time of the act done, or who might exist at the time of the sequestration. Further, that the several entries in the books were rightly received, as all being by the prisoner's authority, or with his knowledge, and therefore tending to show deliberation and intent in the falsity persisted in. Lastly, that there was enough to justify the influence of an intent to defraud; for the duty of making true entries in a trader's books is obvious, and the natural effect of false entries is to mislead, and therefore defraud creditors; and men are presumed to *intend* the natural consequences of their own acts.

1865.
 The QUEEN
 v.
 HUGHES.

point it is clear that the subject of this charge was money which passes by delivery, and cannot be subject of a bailment; *R. v. Hoare (a)*. The contract was not such as could be made the subject of a bill for specific performance, and, therefore, *Holroyd v. Marshall* does not apply. Even if the contract was for the delivery of the cheque, the evidence shows that it was to be applied for paying the wages of the men.

Cur. adv. vult.

September 30. Judgment was now delivered as follows:—

HARGRAVE, J. As to the first question reserved in this special case, we are of opinion—That the words of the third section of the Insolvent Act do not in express terms or by necessary implication require the examination of the voluntary insolvent to be upon oath; and, therefore, the order of sequestration in such cases need not be in wider terms than the statute itself.

That the “*matters aforesaid*” mentioned at the close of this 3rd section are the circumstances mentioned in the commencement of the section as to voluntary insolvency, viz., “That the petitioner is insolvent, and is desirous of surrendering his estate for the benefit of his creditors,” which matters are obviously most appropriately “proved” in this primary stage of such proceedings by the actual signature of the petitioner to the written document *admitting* and stating that “he is insolvent and *desirous* of surrendering his estate,” and forming, in fact, the foundation for the first act of jurisdiction by the Chief Commissioner. The English authorities, cited by Mr. *Martin*, do not apply to the present case, because there the petitions are only recited in the orders, while here they form the essential part of the order itself.

With reference to the authorities cited from *Taylor* and *Starkie* as the application of the maxim, “*Omnia præsumuntur rite et solemniter esse acta*,” we find the authorities as for that matter far better condensed in

(a) 1 F. & F. 647; S. P., *R. v. Rigbey*, 2 Sup. Ct. R. C. L. 176.

Broom's Maxims, (a) especially the important cases of *Howard v. Gossett* (b) and *Taylor v. Clemson* (c); in which latter case Lord *Brougham*, when affirming the decision of the Exchequer Chamber in the same case, (d) says, "It cannot be doubted that where a court of limited jurisdiction, limited either in point of place or of subject matter assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth *all the facts or all the particulars* out of which its jurisdiction arises. It is necessary that the jurisdiction should appear, but there is no particular form in which it must be made to appear. The Court above which has to examine, and may control the inferior Court, must be enabled somehow or other to see that there is jurisdiction,—that is, such jurisdiction as will support the proceeding; but in what way it shall so see is not material, provided it does so see." Even assuming, therefore, that this order which is entitled in the "Supreme Court of New South Wales," is to be construed as the order of a Court of "Inferior Jurisdiction," which was not attempted to be established, we are of opinion that the jurisdiction sufficiently appears on this order. This being our clear opinion on the construction of the third section from whatever point of view this order of sequestration be considered, there is no need for us to consider Mr. Butler's arguments upon the construction of the 107th section, further than to state that we do not see that such arguments are unsound.

1865.
The QUEEN
v.
HUGHES.

As to the second point raised on this special case—viz., that there was no evidence of the defendant's insolvency, in point of fact, at the time of the alleged concealment—we think that the case of *R. v. Knight* (e), exactly meets this objection.

As to the third objection, the case of *R. v. Garsed*, cited by Mr. Butler in this Court; and *Reg. v. Manser*,

(a) pp. 847-856.
(d) 2 Q. B. 978.

(b) 10 Q. B. 411.
(e) 1 Sup. Ct. R., App. 51.

(c) 11 C. & F. 610.

1865.
The QUEEN
v.
HUGHES.

in 4 *Foster v. Finlayson* (a) ; are sufficient to show that there was evidence here to show a general intention to defraud creditors generally.

As to the fourth objection, we are of opinion that there was no necessity that evidence should have been produced that the property embezzled had been discovered before the trial ; the charge being that it had been embezzled and concealed, and the money having been in the hands of the prisoner, on or about the day charged in the indictment, under the circumstances proved at the trial.

As to the fifth objection, the case cited by Mr. *Martin* of *Holroyd v. Marshall*, applies at most only to cases where a bill for specific performance could be maintained between the parties, which cannot be contended in this case ; for here was no mutual agreement or contract capable of being enforced specifically ; that is, *Hughes* could not have filed a bill for specific performance to make *Lockhart* go to Singleton to pay the men's wages, nor could *Lockhart*, therefore, have filed any bill for the delivery to him of these particular cheques or this particular £1100. The "property" therefore, both of the cheques and of the money was, both in law and equity, vested in *Hughes* at the time of the embezzlement.

It was admitted by Mr. *Martin* that he did not deny the legal title to be in the prisoner ; and, if so, it would be a very dangerous and novel step to take in criminal proceedings, to admit that proceedings dependent on questions of property should be affected by the existence of any *equitable* charges upon the "property."

For these reasons we think this conviction must be sustained.

CHEEKE, J. I concur in the judgment of Mr. Justice *Hargrave*, that this conviction must be sustained.

I admit that I entertained very considerable doubt at the trial of the defendant before me, as well as since,

whether the evidence was sufficient to support the information, in consequence of the objection taken by Mr. *Martin* that the information had not been framed under the 107th section of the Insolvent Act—passed expressly by the Legislature to simplify the proof of the evidence of insolvency.

By the 3rd section of the Act, however, it is enacted that “It shall be lawful for any Judge of the Supreme Court upon the petition in writing of any person setting forth that he is insolvent and desirous of surrendering his estate for the benefit of his creditors” either to direct such person to appear before him to be examined touching such insolvency or “upon proof of the matters aforesaid to his satisfaction to accept the surrender of such estate.”

The question therefore is—was not the production of the petition signed by the insolvent, and the acceptance of the surrender of such estate, under the hand of the Chief Commissioner, *sufficient evidence* to go to the jury in proof of the allegation in the information that “he being insolvent his estate was duly surrendered and adjudged to be sequestrated accordingly.”

I think it was, and as it appears to me that this objection was the only important one, and that being now overruled by the Court, the conviction must be sustained.

STEPHEN, C. J., said that he had been consulted on this case by his learned colleagues, whose judgment it was, and concurred in the result, although he arrived at that result for different reasons. He thought the proof of insolvency sufficient, because in the first place there was the written admission of *Hughes* (in the petition) that he was in fact insolvent; and, in the second place, there was an adjudication sequestrating *Hughes's* estate, by the officer, who certified that he was “satisfied” of *Hughes's* insolvency, and it must be presumed, therefore, that he had “duly satisfied” himself of this fact.

Conviction sustained.

1865.

The QUEEN
v.
HUGHES.

1866.

LANE and others *against* TAYLOR and another (b).

A joint action will lie by partners whose goods have been sold and removed under an execution against one of them, confirming *Smith v. Ogg* (a).

To a count in trover by members of a partnership; one of the defendants pleaded that the conversion complained of was a seizure and sale of the goods of the firm by the other defendant, under a writ of *f. fa.* against one of the partners. Replication setting up negligence in the sale, whereby the goods realized much less than their value. *Held* bad on demurrer.

The plea also was held bad as not confessing the conversion complained of.

To a count in trespass for breaking and entering the close of the partners; one of the defendants pleaded the same judgment and execution, and alleging that the other defendant, in pursuance of the writ of *f. fa.*, entered on the premises to execute the same, and there seized the goods of one of the partners. Replication, setting up negligence in the sale. *Held* bad on demurrer, as negligence in the sale cannot make the entry unlawful.

The plea was also held bad as not confessing the entry alleged.

(a) 3 Sup. Ct. R., C. L. 6. (b) Before *Stephen, C. J., Cheeke, J., and Faucett, J.*

THE third count of the declaration stated that at the time, &c., the plaintiffs were lawfully possessed of divers goods and chattels, to wit, horses, timber, saddlery, tools, and other goods and chattels, amounting in all to great value, to wit, the value of one thousand pounds sterling; and that before the committing the said grievances, to wit, on the 1st August, 1863, a writ of execution was sued out of the District Court at Deniliquin, by *John Taylor*, one of the defendants in this action, against the goods and chattels of *Henry George Lane*, one of the plaintiffs in this action, for a certain sum, to wit, the sum £69 19s., being the amount of a certain judgment of the said Court recovered by the said *John Taylor* against the said *Henry George Lane*; and the said writ was delivered to *James Willoughby*, bailiff of the said Court, and one of the defendants in this action, to be executed in due form of law. And the defendants wrongfully intending to injure and prejudice the plaintiffs, under color of the said writ of execution, seized the said goods and chattels of the plaintiffs; and, although the defendants then well knew that the said goods and chattels were the property of the plaintiffs as aforesaid, yet the defendants wrongfully, and under color of the said writ of execution, wholly sold and disposed of the said goods and chattels for a small sum, to wit, the sum of £58 10s. And *John Taylor*, one of the defendants in this action, became the purchaser of the said goods and chattels, and by procurement of the defendants, and by color and force of the said sale eloiigned and carried them away and dis-

posed of them to his own use, whereby they became wholly lost to the plaintiffs. The fourth count was in trover; the fifth for breaking and entering the plaintiff's close, and making a disturbance there, and expelling the plaintiffs from the possession thereof.

1866.
—
LANE
and others
v.
TAYLOR
and another.

The third plea to the fourth count by the defendant, *John Taylor*, stated that before the alleged conversion, the defendant, *John Taylor*, on the 1st August, 1863, in the District Court, holden at Deniliquin, by the judgment of the said Court, recovered against *Henry George Lane*, one of the plaintiffs in this action, £79 8s. 6d.; and thereupon the said judgment remaining in full force and unsatisfied, the defendant, *John Taylor*, sued out of the said Court the writ of execution in the first count mentioned, which said writ was delivered to the defendant, *James Willoughby*, the bailiff of the said Court, to be by him executed as therein mentioned, by virtue of which writ the defendant, *James Willoughby*, as therein mentioned, seized and took and sold the said goods to satisfy the same, which is the alleged conversion.

The fifth plea to the fifth count by the same defendant, contained similar averments, and alleged that *Willoughby*, as such bailiff, "entered on the said close to seize and take, and did there seize and take the goods and chattels of the said *Henry George Lane*, the same then being in the said close, for the purpose of satisfying the said writ, which is the alleged trespass."

The second replication to the defendant, *John Taylor's* third plea, stated that the defendant, *John Taylor*, and the defendant, *James Willoughby*, acting as agent for *John Taylor*, and with his consent and by his authority so wrongfully, negligently, and improperly conducted themselves in and about the conduct of the sale in the third plea mentioned, that by reason thereof the goods in the third plea mentioned were sold for much less than the real value thereof, and than the same might and ought to have been sold for by them, to wit, at prices amounting in the whole to a small sum, that is to say,

1866.

LANE
and others
v.TAYLOR
and another.

£58 10s., being £941 10s. less than they might and ought to have been sold for.

The third replication to the same defendant's fifth plea stated that by virtue of the writ in the said plea mentioned, the defendants after entering the said close, seized and took into their possession divers goods and chattels of the plaintiffs then being thereon, amounting in all to great value, to wit, £800, and proceeded to the sale thereof, and sold the same under and by color and pretence of the said writ for prices amounting in the whole to a small sum, to wit, the sum of £47 10s. 6d.; and the defendants so wrongfully, negligently, and improperly conducted themselves in and about the conduct of the said sale that by reason thereof the said goods were sold for much less than the real value thereof, that is to say, for prices amounting in the whole to £752 9s. 6d. less than they might and ought to have been sold for.

The fourth replication to the same fifth plea, alleged that after the entering, seizing, and taking in the said plea alleged, the defendants ejected, expelled, put out, and removed the plaintiffs from their possession and occupation of the said close, and kept and continued them so expelled up to the time of the commencement of this suit.

Demurrer to the replications and joinder.

December 18,
1865.

Stephen for the defendant. It is submitted that the plaintiffs have not a joint right of action; because *Henry Lane* had no cause of action in respect of the matter complained of. The decision of this Court in *Smith v. Ogg* (a), cannot be supported. Therein an action by *A.* and *B.* for seizing and selling the joint property of *A.* and *B.* under a *fi. fa.* against *A.* only, it was held that the action was right brought in the joint names of *A.* and *B.* How can *Henry Lane* have been injured? He must lose his interest by the sale, and the purchaser of that interest would become a tenant in common with the other partner in the partnership goods. The action ought to have been brought by the two other partners to recover their interest.

(a) 3 Sup. Ct. R., C. L. 6.

It is admitted that the allegations in the fourth replication show a trespass *ab initio*. The matters set up in the second and third replications are no answer to the third and fifth pleas. The fourth count is in trover. The third plea to that count alleges a seizure and sale under a *fi. fa.*, and that that is the alleged conversion. The second replication to that plea admits the writ and the seizure, and it is submitted that this replication is a manifest departure. A mere nonfeasance can be no answer to the justification pleaded. This abuse of a legal authority can be no foundation for an action of trover. The fifth plea sets up as a justification to a count in trespass, an entry to seize and take under a *fi. fa.* The third replication to that plea, alleges that the defendants held the goods under the writ, and by their wrongful, negligent, and improper conduct of the sale, obtained less for the goods than they ought. It is submitted that the defendants did not become trespassers *ab initio*, by selling under the circumstances.

1866.
LANE
and others
v.
TAYLOR
and another.

Darley in support of the declaration and replications. *Smith v. Ogg* is a distinct authority that the action is rightly brought in the joint names of all the partners. It is submitted that the second replication is good; the conversion relied on is the selling the partnership goods for less than might have been obtained. The defendant had a writ against one partner, but how can that justify the selling at a great undervalue of the whole partnership property? It is admitted that unless the original act of taking can be the subject of an action of trespass, it can not be a conversion in an action of trover (a); but it is submitted that as the moment a bailee deals with the goods bailed to him contrary to the bailment trover will lie, so the defendant was guilty of a conversion so soon as he sold the goods of all the plaintiffs, when he was only entitled to sell the undivided share of one of them. By the acts alleged in these replications, the defendant became a trespasser *ab initio*, and then trover will lie. And the third and fifth pleas are bad.

(a) See *Powell v. Hoyland*, 6 Exch. 72.

1866.
 LANE
 and others
 v.
 TAYLOR
 and another.

[*Stephen*, C. J. No objection is noted to them in the demurrer book]. The replications are, nevertheless, in each case good, as showing that the plea is bad. [*Stephen*, C. J. But will trover or trespass lie for the sale and removal complained of? The trespass being to the land or house in which the goods were]. *Price v. Woodhouse* (a) was referred to.

Cur. adv. vult.

May 8, 1866. STEPHEN, C. J., now delivered the judgment of the Court in this case, as follows:—

The plaintiffs in this case, (*Henry and Alfred Lane*, and *John Gresham*), are partners in trade; against one of whom, *Henry Lane*, a writ of *fieri facias* issued out of the Denilquin District Court, at the suit of the now defendant *Taylor*, directed to the other defendant *Willoughby*. Under this writ, both defendants entered certain premises of the firm, or by concert caused them to be entered; and there seized and carried away, and eventually sold, bodily, sundry goods belonging to the partnership—*Taylor* himself becoming the purchaser. The action is brought by all the members, therefore, relying mainly on the decision of this Court in *Smith v. Ogg* (b), to recover damages for those acts; but the question is now raised on the pleadings, by demurrer, to what extent (if any) this joint claim can be supported.

The third count sets out all these facts, excepting that of the entry into the plaintiff's close or place of business. The defendant *Taylor* (alone) demurs, on the ground just mentioned—contending that *Henry Lane*, at all events, being the execution debtor, and liable therefore as such to the extent of his interest, can have no right to join in this action.

We are of opinion, in conformity with the judgment in *Smith v. Ogg*, that the action is rightly brought in the name of the firm. The law is perfectly settled, that, under a writ against the goods of one partner only, executed against goods of the partnership, the entire *corpus* of the whole (or so much as may be necessary) must be

(a) 1 Exch. 559.

(b) 3 Sup. Ct. R., C. L. 9.

seized ; but that none of them can be removed, since nothing is sold by the officer except only the one person's interest therein. Whatever that interest is, or whatever his partnership share, no more can be transferred to the purchaser ; who must ascertain as best he may, how the accounts of the firm and the other members stand with his debtor, before he can know accurately his own rights and position with regard to the purchase. All this may be and is, in this colony especially, a very unsatisfactory state of things ; but such is the law on the subject. The purchaser, however, is not altogether without a remedy—or, at least, the means of discovery ; for, the existing partnership being dissolved as to the goods thus dealt with, he is with respect to them *substituted* for the debtor.

But here the goods themselves—the property at least of the firm up to the moment of sale,—have been sold absolutely, and removed from the partnership premises, and from their control ; the purchaser retaining the goods under that sale, wholly as his own. For this wrong, it is contended that the debtor's partners alone should sue ; the argument being, that the debtor himself has ceased to have any interest in the property. But, as it appears to us, neither by the seizure which was legal, nor the sale which was illegal, did he altogether lose that interest. For, supposing that the levy was excessive, (that is to say, effected on an unreasonable portion of the partnership goods,) the debtor himself would surely have a right of action for that injury. Yet he could not sue alone ; and for the same reason, neither could his partners. All alike would be interested in such a case ; and all, therefore, necessarily would join in the suit. And so here. All the partners alike were interested, although probably not in an equal degree, that no more than the debtor's share or interest should be sold ; and that, at any rate, the goods should not be removed—or sacrificed, as goods sold under such circumstances usually are, by a bailiff's sale of them. The interest of the indebted partner, if no more had been dealt with, might have been bought in by his co-partners ; and he may reasonably complain, as well

1866.

LANE
and others
v.
TAYLOR
and another.

1866.

LANE
and others
v.
TAYLOR
and another.

as they, that the opportunity was not afforded them. The injurious act, consequently, affected all.

But again. The partnership in these goods would not be dissolved, and the purchaser made a tenant in common with *Gresham* and *Alfred Lane*, except by a sale of *Henry's* undivided share. Now there never has, in fact, been such a sale. Or, if the actual sale here operated to that extent alone, notwithstanding the terms used and notwithstanding the removal of the goods, how are the two solvent partners to sue their co-tenant for the latter act? But why should *Taylor* who never assumed to be such a tenant, but has throughout claimed under his purchase as sole owner, be thus protected? The other defendant who has illegally sold and delivered the entirety, would doubtless claim similarly to defeat such an action, on the ground that he was by the seizure a tenant in common. And it would be contended, that any defence available to *Willoughby*, as bailiff, will extend equally to *Taylor* as one acting in his aid. If, moreover, *Gresham* and *Alfred Lane* sued alone, it is not easy to see how damages for the assumed sale, or removal, could be apportioned to them. For their interest in the goods would be that, only, which did not legally pass to the purchaser; and, since that which *did* so pass cannot be ascertained in a Court of Law, how could the value of the residue be estimated there?

But, in our opinion, the illegal sale and removal of these goods by the defendants, with intent avowedly to pass the entire property therein from all the partners, made each defendant answerable in damages to them unitedly, for the reasons given. And further, we think that the act amounted to an excess and abuse of authority in the officer, which rendered the sale itself wholly void—and his proceedings indefensible throughout (a). On the demurrer to their third count, therefore, (the one hitherto under consideration), the plaintiffs will have judgment.

The case of *Mayhew v. Herrick* (b), relied on for the

(a) See *Oxley v. Watts*, 1 T. R. 12; and *Shortland v. Govett*, 5 B. & C. 487.

(b) 7 C. B. 246.

defendants, was cited in *Smith v. Ogg*; and its effect, according to our apprehension, appears to be misunderstood. An execution there had issued against the goods of one partner; and the officer, as in the present case, after levying on the partnership property, sold bodily all that he seized, and delivered the whole to the purchaser. For this act, the other partner alone brought his action against the officer, complaining exactly as in the third count here. There was no count in trover, or trespass, (or in fact any other count), in respect of such sale or delivery. But, it seems, there was a seizure and sale also of other goods, which were the solvent partner's separate property. These last, it was clear, the officer had no shadow of a right to seize, much less to sell; and the first count, which was in trover, had reference exclusively to that seizure. On that first count, the plaintiff *Mayhew* obtained a verdict; and there could have been no question, respecting his right so far. But, as to the second count, some difficulty appears to have been felt; and a motion was made, on leave reserved, to enter a verdict for him on that count, for one moiety (being his share) of the value of the joint property.

Now, there was no motion—according to the report,—to add the amount of that moiety to the *first* count; and with respect to the second, which (as already stated) was not in trover, the entire facts were there set out—so that the defendant's authority, as well as his proceedings under or by colour of the writ, appeared on the record. Some of the arguments and observations in the case, therefore, appear to have been uncalled for and inappropriate. The only pleas were, not guilty, and a denial of the ownership; that is to say in *Mayhew* alone, as alleged in the first count, and in the two partners, as averred in the second. The Court, regarding the officer from the moment of seizure as a tenant in common with *Mayhew*, discussed the question of one such tenant's liability to his co-tenant, in trover, for a mere wrongful sale; but finally decided, without reference to that point, that the plaintiff was entitled to recover on his second count—to the amount of the value of his moiety.

1866.

LANE
and others
v.
TAYLOR
and another.

1866.

LANE
and others
v.
TAYLOR
and another.

That case, on examination, does not militate against the decision in *Smith v. Ogg*. Even if the second partner (the execution debtor) ought there to have been joined, the omission could only—according to the authorities cited in 1 Ch. Pl. 6th edition 66,—have been taken advantage of by plea in abatement; and there was no such plea. The one partner therefore being the only plaintiff, and appearing to be in fact interested in half the property, but no more, rightly recovered in the action to the extent of that moiety. *Mayhew* sought, indeed, only to recover the value of his moiety; and was willing, accordingly, to recognise the seizure as legal, and the sale as having passed the interest of his partner. The question of trespass or tort *ab initio*, therefore, or the right of that partner to join in the action, was not raised.

The sheriff—or other officer executing a writ—is not, we apprehend, merely constituted a tenant in common with the other partners, on seizing partnership effects under a writ against one of the firm. If strictly such a tenant and no more, he would scarcely possess that degree of control over the property, which an officer charged with such a duty requires. For all purposes, he cannot be considered *simply* as a tenant in common. A sheriff's actual position, in these and similar cases, is that of a public officer, clothed with an authority given to him by the law, which he is to exercise only according to law; and when, by any act, he exceeds that authority, he becomes—by the well known rule of law—a tortfeasor from the beginning. On this ground alone, if on no other, the present action by the partners would seem clearly to be maintainable.

The fourth count is in trover; and to this the defendant *Taylor* pleads, in effect, (in his third plea), that the conversion complained of was a seizure and sale by *Willoughby*—that is to say of the goods of the firm, under a writ against one of that firm. To this there is no demurrer, nor any notice of objection in the demurrer book. But the plaintiffs have filed a replication, (their second on the record), setting up *negligence* in the sale—whereby the goods realised much less than their value. This

replication is demurred to, and it is clearly bad. No amount of negligence or mismanagement, merely, can countervail the defence of a sale under the writ relied on, if that sale were otherwise valid; or make a conversion wrongful, which in itself was authorised by that writ.

As the Court, however, is bound to give judgment as to each issue on the whole record, the question yet remains for us whether the plea itself, although not demurred to, can be maintained. We have already explained why the sale of these goods, instead of the one partner's interest in them, was illegal. But the seizure of the goods, in the first instance, was perfectly right; and the mere sale of them, if there were no more, (and no more is admitted in the plea,) does not itself amount to a conversion. The plea, therefore, does not *confess* the count to which it is directed; and if it did, it would contain no matter sufficient to *avoid* it. The conversion relied on by the plaintiffs, we presume, is the delivery and removal of the goods—consequent on the sale: but those acts, as we have seen, cannot be justified. On these pleadings, consequently, as they stand, (the demurrer to the replication to the 3rd plea,) the plaintiffs must also have judgment. The further objection exists, which we notice in dealing with the 5th plea, that the seizure and sale are not admitted to have been by *Taylor*, the party pleading; but are spoken of by him as the acts of *Willoughby* only.

There is yet a fifth count in the declaration; which charges, simply, an entry into the plaintiffs' close. To this, the 5th plea (by *Taylor* alone as before) sets out the judgment in the District Court, with the writ issued thereon; and alleges that the defendant *Willoughby*, in pursuance of such writ, entered on the premises to execute the same, and there seized *Henry Lane's* goods accordingly. The plaintiffs reply, thirdly, the same in substance as to *Taylor's* third plea; and the replication is demurred to, on similar grounds to those taken to the second. It is clearly bad, like its predecessor; for negligence in the sale, merely, cannot make the entry complained of unlawful, if the plea itself, but for the matter stated in reply,

1866.

LANE
and others
v.
TAYLOR
and another.

1866.
LANE
and others
v.
TAYLOR
and another.

discloses a justification. Now the entry by *Willoughby*, or by *Taylor* in his aid, under the writ in question, was clearly justifiable. But the difficulty here is, though the objection seems purely technical, that this 5th plea—as it stands—professes or assumes to answer what it does not either in terms or impliedly admit. The plea is by *Taylor* alone, and it admits no entry by himself, but one by *Willoughby* only. As a defence for the latter, therefore, (or for *Taylor* equally, had he entered,) it would be a complete answer; but, as now framed, the plea fails.

If this defendant's omission to confess an entry, by himself as well as by *Willoughby*, was accidental, he may at once amend his 5th plea. And he may do so without costs, as the only demurrer is to the replication, which is bad; and there is no note of an exception, on any ground, to the plea, nor was the point even suggested on the argument.

There is another replication by the plaintiffs (their fourth) to the same 5th plea, that the defendants not only entered the close mentioned, but expelled the plaintiffs therefrom. This is also demurred to on the record; but it was frankly admitted for the defendants, that the replication is good—as, if true, they made themselves by that act trespassers from the beginning. On the demurrer to this fourth replication, consequently, judgment will be for the plaintiffs.

Judgment accordingly.

1866.

MACLEAN *against* DIGHT.

THE first count of the declaration stated that by an agreement of 26 September, 1864, it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant, and the defendant should purchase of the plaintiff all the right, title, and interest (other than the equity of redemption) of certain persons, namely, of *G. Humphries*, heir at law of *G. Humphries*, then deceased, and of *J. Cunningham* and *G. Cunningham*, devisees of the said *G. Humphries*, deceased, of, in, and to a certain piece or parcel of land, (then described), at the price of £250, and upon the terms and conditions following, that is to say, that the defendant should pay to the plaintiff a deposit of £62 10s., in part of the said purchase money, at the time of the making of the said agreement, and that the defendant should pay to the plaintiff the balance of the said purchase money within seven days from the date of the said agreement. Averment of fulfilment of all conditions precedent. Breach, non-payment of the balance, *modo et forma*.

The second count stated that "in consideration of the plaintiff agreeing to sell to the defendant all the right, title, and interest (other than the equity of redemption) of certain persons (as described in the first count), of and in and to a certain piece or parcel of land (as in the first count) for the price of £250, the defendant promised that he would within a reasonable time in that behalf

The first count of the declaration stated that A., sheriff of the colony, &c., agreed to sell to the defendant, and that the latter agreed to buy from him "the right, title, and interest" of one H., "heir-at-law," and of J. and G. C., "devisees" of G. H., deceased, to and in certain lands described at a price named. Averment of fulfilment of all conditions precedent. Breach, non-payment of balance.

The second count was for not tendering or preparing a conveyance of the premises, for execution by the plaintiff. Plea, setting out the proceedings in an action by one

C., against the same heir and devisees, on certain debts due by the testator in his life time; in which action these defendants allowed judgment to go against them by default; whereupon a writ of *fiery facias* issued to the plaintiff as sheriff, commanding him to levy the amount of that judgment on the lands and goods of the heir and devisees. The plea then alleged that the sale was under the writ, and that the heir never had any title to or interest in the land in question, and that the devisees held it in trust only, without any beneficial interest in themselves whatever.

Replication, setting out the testator's will, by which it appeared that he left all his property to the devisees named, the land in question being a portion in trust for his wife and children, alleged that the testator died seized thereof. *Heid*, on demurrer that the plaintiff was entitled to judgment.

Every devise is void as against a testator's unpaid creditors, of every degree, and land of which the testator died seized remains vested in the heir for their benefit.

1866.

MACLEAN

V.

DIGHT.

prepare and tender to the plaintiff, for execution by him, a conveyance of the said premises. A verment of readiness and willingness to execute, and of the fulfilment of all conditions precedent. Breach, refusal to prepare and tender, &c.

Demurrer and joinder.

Plea 1. That after the death of the said *G. Humphries*, deceased, one *D. Cunneen*, sued the said *G. Humphries* and the said *J. Cunningham* and *G. Cunningham* in the declaration mentioned, in this Honorable Court, and that the declaration in the said action was in the words following; (the plea then set out at length the declaration in the action referred to, which was to recover the amount of certain overdue and unpaid promissory notes of the said *G. Humphries*, and interest thereon). The plea then alleged that the defendants in the said action suffered judgment by default therein, and the plaintiff in the said action signed judgment therein against the said defendants, which judgment was in the words following; (the usual signed memorandum of the judgment was then set out at length). The plea then averred that afterwards the said plaintiff in the said action sued out of this Honorable Court a writ of *fiery facias*, therein directed to the plaintiff as Sheriff of New South Wales, whereby the plaintiff was commanded in the words following (the material portions of the writ of *fiery facias* were then given). The plea then averred that he the plaintiff as such Sheriff, acting under the said writ, made the agreement with the defendant as in the said declaration mentioned. And that the said *G. Humphries*, in the said declaration mentioned as heir at law of the said *G. Humphries*, deceased, had not before or at the time of such agreement and has not any right, title, or interest in or to the said lands in the declaration mentioned; and that the said lands were before and at the time of the said agreement and are the lands of the said *J. Cunningham* and *G. Cunningham* as trustees for divers *cestui que trusts* beneficially interested therein, and by reason of the premises the plaintiff is unable to make any title to the interest sold

by him as in the declaration mentioned, or to the lands in the said declaration mentioned.

Demurrer and joinder.

Replication. That the said lands in the declaration mentioned became and were vested in the said *J. Cunningham* and *G. Cunningham* under and by virtue of the last will and testament of the said *G. Humphries* deceased, and not otherwise, which said last will and testament was and is in the words following, that is to say:—"This is the last will and testament of me *George Humphries*. I give and bequeath to *John Cunningham*, of Bathurst, and to *George Cunningham*, of Windsor, the whole of the property which I may die possessed of, whether landed or personal, for the sole benefit of my widow, *Jane Humphries*, to be enjoyed by her during her life, and at her death the property to be sold and the proceeds to be divided equally amongst my sons and daughters." Averment, that the said will of the said *G. Humphries* deceased was duly executed, and that the said *G. Humphries* who is deceased is the *G. Humphries* deceased mentioned in the pleadings hereinbefore set forth. And the said *J. Cunningham* and *G. Cunningham* are the *J. Cunningham* and *G. Cunningham* respectively mentioned in the aforesaid pleadings; and the said lands in the aforesaid pleadings mentioned are lands which were of the property of which the said *G. Humphries*, deceased, died seized and possessed, and by reason of the premises, the said devise of the said land to the aforesaid *J. Cunningham* and *G. Cunningham* was and is void as against the aforesaid *D. Cunneen*.

Demurrer and joinder.

Martin, Q. C., in support of the declaration and replication and of the demurrer to the pleas. The contract declared on is for the sale of all the right, title, and interest of the heir and devisees of the testator in certain land, and contains no agreement that the heir and devisees had any interest in the subject matter of the sale. The questions are chiefly these, whether under an execu-

1866.

MACLEAN
v.
DIGHT.

1866.

MACLEAN
v.
DIGHT.

tion against the lands, &c., of the devisees, the sheriff can take and make a title to land which is so devised; and whether the sheriff is bound to make out or convey any title at all to a purchaser at a sheriff's sale; *i.e.*, whether his sales are not of the chance of a title, and whether there was here, looking at the whole record, any title seizable by him vested in either the devisees or heir. It is submitted that under a contract of this kind, it is immaterial whether there is a good title or not; and the responsibility is on the purchaser of enquiring what the interest is that is sold. The right of action by a creditor is given against the devisees; and it is immaterial whether they are devisees in trust or not. The law is thus stated by the Lord Chancellor, in *Morley v. Morley* (a): "Before the statute of 3 W. & M., c. 14, a devise defeated the right of a creditor altogether, because the judgment was that it should be recovered out of the real estates that had descended to the heir; and the answer would have been *nil* to that, if the lands had been devised away. This was a very improper way of defeating the rights of creditors; and to obviate that, the statute of Fraudulent Devises was passed, which substantially made the lands liable just in the same way if they had been devised as if they had been left to descend; and the statute says that the devise shall be fraudulent and void as against the creditors" (that is specialty creditors). "Then it says, that notwithstanding such devise, the creditors may sue the heir, joining with him as a co-defendant, the devisee." Under the 1 W. IV., c. 47, s. 4, a specialty creditor can now maintain an action against the devisee alone where there is no heir, which it was decided he could not do under the statute of W. & M; *Hunting v. Sheldrake* (b). But whereas no action against the heir, or, if the property be devised, against the heir and devisee, could in England be maintained, except in respect of debts by *specialty*, in which the heir was bound, the remedy is afforded in this colony equally in respect of contract debts. The law on this subject has been recently

(a) 25 L. J., Ch. 4.

(b) 9 M. & W. 256.

considered by the Privy Council, in *Bullen v. A'Beckett* (a), where it was held (as the law has for many years been supposed to be), that the object of the 54 G. III., was to render real estate in this colony liable for debts of every kind, as it was in England for specialty debts; and the creditor is to proceed in respect of the real estate as he would in respect of the personal estate; but in both instances, against the person in whom the property is. The subject is alluded to in the Chief Justice's book on the Constitution of the Supreme Court: "Some Legislative provision seems desirable, to define or declare the title acquired by purchasers, under a sheriff's sale; as also, to facilitate the investigation of the defendant's title, and compel the production of his title deeds. In this colony, the sheriff sells the defendant's 'right, title, and interest,' whatever they may be; and he conveys the same to the purchaser, and to his 'heirs and assigns,' by an instrument called a bill of sale." He referred to *Chitty on Pleading* (b). It is consistent with the plea that the land in question was vested in the devisees under a devise, void as against the judgment creditor, and the devise being void, an interest passed under the contract.

1866.
MACLEAN
v.
DIGHT

Stephen, in support of the pleas and the demurrer to the declaration and replication. It is submitted that this land thus devised is subject to a trust, and cannot be sold by the sheriff, but can only be reached by means of a Court in Equity. *Bullen v. A'Beckett* is a distinct authority, if the action had been against the executors, and the sale had been under a *fi. fa.* in such action, that no title to the land would have passed. The land to be sold must be that of the debtor, but under this writ the sheriff is directed to sell the land of the heir and devisees, and not of the testator. It is submitted that the writ and proceedings are irregular, although they cannot be questioned at the instance of the defendant, the purchaser. The statute 54 G. III., never intended to place land in the same position as chattels were before it was passed. The

(a) 1 Moore, P. C. N. S. 223; 9 Jur. N. S. 973.

(b) 1 vol. p. 60; 2 Id. 333.

1866.
MACLEAN
v.
DIGHT.

declaration is clearly bad, because it does not allege that the sale was made by him in his official character. [Stephen, C. J. If you cannot show that the *fi. fa.* is bad, by pleading it you make the declaration good].

Cur. adv. vult.

May 8.

STEPHEN, C. J., now delivered judgment in this case as follows :—

This is an action by the Sheriff, or brought in his name, against the purchaser at auction of a certain interest in or title to land, to recover the balance of the purchase money. The declaration, without showing that the plaintiff acted as sheriff, states that he agreed to sell to the defendant, and that the latter agreed to buy from him, the "right, title, and interest" of one *Humphreys*, "heir at law," and of *John and George Cunningham*, "devisees" of *George Humphreys*, deceased, to and in certain land described, at a price named; of which the defendant has paid a portion only. The second count is for not tendering or preparing a conveyance of the premises, (by which must be understood the right, title, and interest aforesaid,) for execution by the plaintiff.

The defendant has demurred to the declaration, insisting that it discloses no consideration for his promise, and no mutuality in the contract; the plaintiff not affecting to have in himself any title, or right whatever to convey the land sold by him. The defendant has pleaded also two pleas. Of these, the second sets out the proceedings in an action by one *Cunneen*, against the same heir at law and devisees, on certain debts due by the testator in his lifetime; in which action, those defendants allowed judgment to go against them by default—whereupon a writ of *fi. facias* issued to the plaintiff, as sheriff, commanding him to levy the amount of that judgment, on the lands and goods of the heir and devisees. The plea then alleges, that the sale was under the writ; but that the heir never had any title to, or interest in, the land in question, and that the devisees hold it in trust only, without any beneficial interest in themselves whatever.

The plaintiff demurs to this, on the ground that *Cun-*

neen's judgment against the heir and devisees, as set out in the plea, is enforceable against the deceased's land, notwithstanding any devise or trust by him; that the plaintiff did not undertake that the heir and devisees had any beneficial interest in the property; that the defendant purchased, in fact, whatever title the sheriff might be able to give; but that, as the land appeared by the plea to be in the devisees, under a devise void against the judgment creditor, there was a title (or at least a right to convey) in the sheriff, even had he undertaken for such right or title. The plaintiff has also replied, setting out the testator's will; by which it appears, that he left all his property to the devisees named, the land in question being a portion, on trust for his wife and children. And the replication alleges that *Humphreys* died seized thereof. The plaintiff demurs to this replication, on (substantially) the ground taken in his last exception to the declaration.

We have no doubt that, on these pleadings, the plaintiff is entitled to recover. It is unnecessary to say what would have been our judgment, had the fact not appeared (as it now does) that the plaintiff contracted to sell, and sold the property in question, or the "right, title and interest" to and in that property, as sheriff of the colony, under a writ in that behalf duly issued to him. And the questions may still be considered open, whether the sheriff sells under an execution in any case, or contracts to sell, more than (as the plaintiff contends here) the debtor's title and interest, whatever these may turn out to be; and therefore, whether he can or not compel the purchaser to complete his contract, although such debtor should be shown to have no title or interest whatever. An ordinary vendor of land, no doubt, cannot insist on the vendee's accepting a bad title; much less compel payment of his purchase money, where there exists no title at all. But does the rule extend to a sheriff, acting simply as such? How is he in such cases to prepare an abstract of title, or procure the materials from which it may be constructed? If, indeed, the land levied upon be *not* that of the debtor, a purchaser from

1866.

MACLEAN

v.

DIGHT.

1866.

MACLEAN
v.
DIGHT.

the sheriff can of course acquire no title thereto. But was not that a risk, which the purchaser took knowingly of himself? And in the mean time, it would seem that (under 22 Vic. No 1 section 3) the sheriff's bill of sale will not be wholly valueless; as it is made *prima facie* evidence, that there was a valid judgment and writ to support the levy.

But in our opinion, enough is stated on the pleadings in this case, to show that in effect there was here a title in the judgment debtors, or some of them; a title, that is to say, good against all the world except the creditor. The debt due to *Cunneen* appears, by the record stated in the plea, to have been on simple contract; and therefore, in England, neither by the 3 and 4 W. and M. c. 14, nor the 1 W. 4 c. 47, (introduced here by the 5 W. 4 No. 8), could the heir, or heir and devisee of the debtor, have been made liable. But, it is hardly necessary to say, the distinction makes no difference in this colony; the 54 G. 3 c. 15, s. 4 having, in respect of actions against such heir, or heir and devisees, placed specialty and simple contract debts on the same footing. By the same statute, also, land may be sold under an execution equally with chattels (a).

Here, then, is a judgment obtained by a creditor, against his debtor's heir and devisees. The heir is by the statute—the 3 and 4 W. & M.—made a necessary party, (where an heir exists), for the reasons so well explained by Lord *Cranworth*, in *Harland v. Morley*, (b). See also *Hunting v. Shelldrake* (c). And since, by the same statute,—or rather, in this colony, by the combined effect of the several statutes,—every devise is void as against the testator's unpaid creditors, of every degree, the land remains (or becomes) vested in the heir for their benefit. The devise itself being thus defeated, the trust which it assumed to create is of course at an end also.

The sheriff however has also, and the defendant in this action has purchased, and the deed of conveyance or sale will accordingly transfer, the title and interest equally of

(a) See Steph., Const., & Prac., of S. C., 249 & 252.

(b) 25 L. J. Ch. 4.

(c) 9 M. & W. 263.

the devisees as of the heir. Whether the legal estate or title, consequently, be considered as residing in the devisees, or in the heir, the result for the purposes of the execution, and of the sale under it, must be the same. In strictness indeed both those parties, by letting judgment go by default, have confessed real assets to be in their hands; though not, that the particular land is a portion of such assets. But, of course, although the judgment necessarily was against both the heir and the devisees, the same land obviously cannot at the same time belong to, or be vested in both.

In point of form, it must be admitted that the record in *Cunneen's* action is culpably faulty. He has not even taken the trouble, we perceive, to draw up his judgment. There is nothing beyond the usual signed memorandum filed or deposited in the proper office. This, as every lawyer knows, although for practical purposes equivalent to a judgment, is neither the judgment itself, nor the record of a judgment. It is merely, in strictness, an entry or authorised act by the plaintiff, on which the formal record is eventually prepared. And the proper form of judgment would have been, specially, that the debt be levied of the lands—not of the heir, or of the devisees, but—which were of the *deceased* at the time of his death, and which have come to their hands as such heir and devisees, respectively. But, with all this the sheriff has no concern. His authority is the writ alone; and the question therefore which remains is, merely, whether that writ enabled him to take in execution the lands of the deceased.

We are of opinion, that it was sufficient for that purpose. The writ no doubt purports to be against the goods and moneys, as well as the lands, of the devisees and heir of *Humphreys*;—naming, and so describing them, but not stating that either those goods or lands were to be such, as the defendants held in the *character* of heir and devisees. No goods or moneys, indeed, could be in the hands of the former, except in his natural capacity. We conceive, however, that there is enough on the face of the writ, reciting as it does a corresponding

1866.
MACLEAN
v.
DIGHT.

1866.

MACLEAN
v.
DIGHT.

judgment, to show the intention ; and the sheriff was justified, in at all events taking under it lands vested in the devisees, (or, failing their title as such, in the heir,) by devise or descent respectively from the debtor. And this it appears that he has done, neither less nor more.

Our judgment, consequently, will on the several demurrers be for the plaintiff.

Judgment for the plaintiff.

HARBOTTLE and others *against* HARGRAVES.

In a case in which there were eight plaintiffs, it appeared that the plaintiffs and the defendant put into a common fund £180 (£20 a piece) ; out of which it was agreed that the defendant should receive 100 guineas for his trouble in examining and reporting upon a quartz reef, and 50 guineas for his expenses. If the report was favorable the plaintiffs, the defendant, and A. were to work the reef in partnership. The defendant received the 150 guineas, but neither made a report nor inspected the mine. *Held*, that the plaintiffs being joint contributors with the defendant could not sue him to recover back the 50 guineas or any part thereof.

THE first count of the declaration alleged an agreement that in consideration of £150 to be paid by the plaintiffs to the defendant, the latter agreed to proceed to Queensland, and there to examine a quartz reef and "to give the plaintiffs a report upon the same, and to advise the plaintiffs generally as to the best mode of working the said reef for the purposes of gold-mining." Averment of payment of £150 as agreed upon, and fulfilment of all conditions precedent. Breach, that the defendant failed and refused and still refuses to proceed to the said reef, and to examine the same, and has wholly failed, &c., to give the plaintiffs any report upon the same, or any advice as to the best mode of working the reef, whereby, &c. There was a second count on the same agreement, and the money counts.

Pleas (1). To the first and second counts *non assumpsit* ; (2). To the same, exoneration and discharge ; (3). To the first count a traverse of the breaches alleged in that count ; (4). To the second count a traverse of the breaches alleged in that count ; (5). To the first and second counts that the agreement in the said counts respectively mentioned was and is the same agreement, and that the said quartz reef in the first count and second count respectively mentioned, was and is the same quartz reef, and that the plaintiffs and defendant agreed together to become partners in a speculation of working the said quartz reef, and that the agreement on the part of the defendant to proceed from Sydney to the colony of Queensland, and there to ex-

amine the said quartz reef, and to give a report upon the same, and to advise generally as to the best mode of working the said reef for the purposes of gold-mining, was made by the defendant not with the plaintiffs alone, but with the partnership firm consisting of the plaintiffs and the defendant as partners in the said speculation, and that the damages sustained by reason of the breaches in the first count complained of, and by reason of the breaches in the second count complained of form an item in the partnership accounts and the plaintiff's interest therein cannot be ascertained without winding up the partnership accounts, which was not done before the commencement of this suit; (6). To the residue, never indebted.

1866.
HARBOTTLE
and others
v.
HARGRAVES.

The plaintiffs took issue on the first, second, third, fourth and sixth pleas, and to the fifth plea they replied that they did not agree with the defendant to become partners as alleged, and that the agreement on the part of the defendant in the said plea mentioned was not made with any such partnership firm as in the fifth plea alleged, but with the plaintiffs alone. Issue thereon.

At the trial before *Cheeke, J.*, and a jury of four in February, 1866, it appeared that the eight plaintiffs and the defendant put £180 into a common fund; each of them contributing £20, of which it was agreed that the defendant should receive a hundred guineas for his trouble, and fifty guineas for his expenses in examining and reporting on a quartz reef at Peak Downs, in Queensland, the remaining £22 10s. being intended to pay the wages of labourers. If the report should be favorable, the plaintiffs, the defendant, and another, *Bensusan*, to whom the reef belonged, agreed to work the reef in partnership. It appeared that the defendant received the 150 guineas, but neither made a report nor inspected the mine. When he arrived at Brisbane he wrote to Sydney complaining of the title, and ultimately returned to Sydney. It was objected that the plaintiffs being joint contributors with the defendant could not sue him on this contract, or recover back from him the

1866.

HARBOTTLE
and others
v.

HARGRAVES.

£157 10s., or any part thereof;—that under the circumstances a partnership existed, and therefore that the plaintiffs could not succeed.

The learned Judge was of that opinion, but left the case to the jury, who found a verdict for the defendant.

March 6.

Sir *W. Manning*, Q. C., now moved for a rule *nisi* for a new trial. The object of the association was to examine this reef, and the plaintiffs and defendant united together for that purpose, and contributed to a common fund to pay the preliminary expenses; but there was no partnership. Where a number of persons were associated together in a society for the protection of trade, the professed objects of which were to watch the progress of any measure in Parliament affecting trade interests; and to protect its members from the practices of the fraudulent and dishonest, each of the members having to contribute a certain sum annually to the funds of the society, and becoming thereby entitled to such benefits as might result from its operations, it was held that this did not make them partners *inter se*; *Caldicott v. Griffiths* (a). *Martin*, B., says, "It is neither more nor less than a number of persons who choose to subscribe to a fund for the purpose of obtaining certain information useful to themselves in their business. The fact of the plaintiff having subscribed with the view to entitle him to the benefit of such information, does not constitute him a partner, so as to preclude him from suing another subscriber who gives the order." It is submitted that any partnership in the present case was entirely prospective, and that the plaintiffs can maintain the present action. But, at all events, one of the plaintiffs can recover from the defendant his separate proportion of the funds, and if so, the verdict against all can be reduced.

STEPHEN, C. J. I am of opinion that there should be no rule. It seems to me to be clear that the £180 was the joint fund of all the nine contributors, and there-

(a) 8 Exch. 899.

fore the £157 10s. is not the money of the eight plaintiffs; but is equally the money of all the nine adventurers. How then can the eight sue jointly to recover the money? In my opinion, the plaintiffs cannot recover any portion of the joint fund either unitedly or separately. It is not that each one says, "I will give you £20 for your exertions, and if you find the result favorable, I will enter into partnership." But by some bungling arrangement, each one paid £20 into a common fund, the defendant with the rest contributing the same amount. Out of that common fund it was agreed by all that the defendant should take £157 10s. for the purposes of examining the reef. How can any of the contributors say that any particular portion of that £157 10s. belongs to him? It is clear that the defendant is himself entitled to a particular portion of that amount, and of the balance of the common fund which is left untouched. It seems to me also very doubtful whether there has been a total failure of consideration.

1866.
HARBOTTLE
and others
v.
HARGRAVES.

CHEEKE, J., concurred.

FAUCETT, J. It seems to me that there was not a total failure of consideration. The amounts were paid into a common fund; and the defendant has just as much right to be plaintiff as any of the nominal plaintiffs.

Rule refused.

1866.

March 31.

Ex parte CHARLES (a).

A was summoned to the K. Small Debts Court by the municipality of K. for £4 10s. 4d. being the rate due by A. for the half year ending July 1865. A had been previously served with a notice to pay £15 for rates due by him to the same municipality for a preceding year. But the latter rate was formally abandoned by a resolution of the council, and entry made in the minute book that it was "cancelled and relinquished." At the trial the chairman stated that the municipality had no claim against the defendant except for the rate of £4 10s. 4d. then sued for. *Held*, on motion for a prohibition, that the Court of Petty Sessions had jurisdiction, and that there had been no splitting of the cause of action for the purpose of bringing the same within the jurisdiction of the Small Debts Court.

STEPHEN, on the 15th of February, had obtained a rule for a prohibition to restrain certain justices and the Chairman of the Municipality of Kiama, from further proceeding with an adjudication or order made by the justices sitting in Petty Sessions, under the 10 Vic., No. 10, against the defendant, for the payment of certain rates alleged to be due by him to the municipality, on the ground that the total sum due exceeded the sum of £10.

The defendant had been summoned to the Kiama Small Debts Court, on the 30th January, for rates for the half year ending 30th July, 1865, namely, £4 10s. 4d. He appeared on that day and objected to the jurisdiction of the Court, on the ground that the sum due to the municipality far exceeded the sum of £10, inasmuch as he had, as appeared by papers which he produced, received a notice that £15 was due on the 11th November, 1863, as a rate by him to the municipality, and that £4 8s. 10½d. was also due in September 1865, and various other sums which were particularised; and that the amount exceeding £10 had been abandoned for the purpose of having the case brought into the Small Debts Court. The justices, however, overruled the objection, and gave judgment for £4 10s. 4d.

The affidavit of the chairman on showing cause, stated that the sum claimed before the justices was and is the only sum claimed by the municipal council of Kiama as being due to it by *Charles*. The notice as to the £15 "relates to rates which have since and before the making of the rate sued for been formally abandoned" by the advice of counsel, "and such abandonment was by a resolution of the council, made on the 4th October now last past, in the words following: 'That all rates due to this council by any rate-payer prior to the 1st March, 1865, be hereby cancelled and relinquished.'" This resolution it appeared was entered in the minute book and open to all concerned, and at the trial evidence of it

(a) Before *Stephen*, C. J., *Checke*, J., and *Faucett*, J.

was given, and it was stated by the chairman of the municipality that the latter had no claim against the defendant except for the rates then sued for.

1866.

Ex parte
CHARLES.

Stephen and *Darley* now moved to make the rule absolute. It is plain from the rate papers which were brought before the justices, that the rate of £15 was still due, and that there is nothing to prevent the municipality suing the defendant for that amount in the Supreme Court. Suppose such an action were now brought, would the municipality be estopped by the statement of the Chairman before the justices. This Court might consider the rate legal, and the amount recoverable, notwithstanding the opinion of counsel to the contrary. It is submitted that if the rate is illegal, the resolution of the council is immaterial; and if it is legal, the resolution is *ultra vires*. The power of abandoning a portion of a debt due must be given by statute, as is done in the District Courts Act; but no such power is given by the Small Debts Act. The Legislature has given these justices a jurisdiction up to a certain amount, and the Court will restrain them from exercising a jurisdiction where a larger amount is at stake.

The *Attorney-General*, who appeared for the Justices, and Sir *W. Manning*, Q. C., who appeared for the Corporation, were not called upon.

STEPHEN, C. J. I am of opinion that the Justices had jurisdiction. The 9th section of the Small Debts Act enacts that it shall not be lawful to split or divide any cause of action for the purpose of bringing the same within the jurisdiction of any Court of Petty Sessions. It has been objected by the defendant that the Court of Petty Sessions had no jurisdiction, because the total sum due by him was beyond £10. The answer to that objection is that the excess beyond the £10 imposed by a former rating never was due, because it was illegally imposed, and accordingly has been by a formal resolution abandoned. It seems to me that the Corporation could not by their own act relinquish the alleged first rate for the purposes merely of

1866.

Ex parte
CHARLES.

this particular action. But the abandonment here in the books of the Corporation is general, or rather it is an acknowledgment of a mistake,—of an illegality; and the first rate was altogether relinquished on this ground alone. It is, therefore, no “splitting of a cause of action for the purpose of bringing the same within” the Justices’ jurisdiction within the meaning of the statute. The Corporation—or this plaintiff, the Chairman, suing for them—admit or allege that there is only £10 or less due, the excess spoken of being illegal. There is nothing to countervail this; and this Court will conclude therefore that the Petty Sessions had jurisdiction, as one attaching to a “cause of action” not exceeding £10. The rule, therefore, will be discharged without costs to the Justices, but with costs against the defendant to the Corporation.

CHEEKE, J., concurred.

FAUCETT, J. The Municipal Council admit that the first rate is illegal, and for the present proceeding we must assume that it is illegal. For it rested with the defendant to show that what was abandoned was legally imposed, and he has not shown it.

Rule discharged.

March 31.

Ex parte GREEN (a).

Summary jurisdiction was conferred on two Justices; three Justices adjudicated, of whom two only heard the evidence. Held, that since all the three concurred in the adjudication, the third Justice did not invalidate the decision of the other two.

DARLEY moved to make absolute a rule *nisi* for a prohibition under the Justices Act to restrain certain Justices from further proceeding in respect of a certain conviction, whereby the applicant *Green* had been found guilty of causing certain sheep, being his property, to be brought across the boundary from the adjoining colony of Victoria into New South Wales, without having first obtained from an Inspector of Sheep of the colony of New South Wales, the necessary certificate entitling him so to cross the said sheep, contrary to the 27th section of the Scab in Sheep

(a) Before Stephen, C. J., Cheeke, J., and Faucett, J.

Act of 1863 (a). There are two grounds. First, that the conviction was contrary to the evidence. The sheep in question were in the charge of the shepherd of the applicant's, and in bringing the sheep across he acted in express contravention of his master's orders, as is sworn by the applicant in the affidavit sworn by him in support of the rule. Second, that one of the Justices who adjudicated upon the case, did so, although he had not heard the whole of the evidence. It appears that there were three Justices adjudicating, of whom two only heard the evidence.

1866.

Ex parte
GREEN.

Stephen showed cause on behalf of the Inspector of Sheep.

Per Curiam. We are all of opinion that we cannot act on the oath of the defendant alone (whose evidence was inadmissible before the Justices) in deciding this case; and that on the evidence before the Justices there was enough to entitle them to form a conclusion, which in fact they did form, that the shepherd was acting in accordance with his master's instructions in bringing these sheep across.

We also think that the third Justice, since all three concurred in the conviction, could not invalidate the decision of the other two.

Rule discharged.

1866.

March 31.

Ex parte GREEN.

The 27th section of the Scab in Sheep Act of 1863, provides that no sheep shall be brought across the boundary from any adjoining colony until the owner shall have obtained from some inspector a certificate, &c. The 28th section enacts that as soon as any sheep shall have passed any such boundary, the owner shall obtain from the inspector, "in addition to the certificate aforesaid," a permit. *Held*, (Faucett, J., dissentiente), that the provisions of the 28th section were applicable to sheep illegally brought over the border, without a certificate having been given, as well as to those in respect of which a certificate shall have been given.

DARLEY moved on behalf of the same defendant as in the last case, to make absolute a rule granted on the 30th January, for a prohibition to restrain further proceedings in respect of a conviction whereby he (*Green*) had been found guilty of and fined for travelling, or allowing to travel in New South Wales, certain sheep belonging to him that had passed the boundary of the adjoining colony of Victoria without the necessary permit from an inspector of sheep, on the ground that *Green* had not been guilty of any offence within the 28th section of the Scab in Sheep Act of 1863 (*a*). And secondly, that the justices having immediately before the hearing of this case, heard the preceding case against the same person for causing the same sheep to be brought across the boundary, and convicted him thereof, ought not to have adjudicated upon the case, the offence charged

(*a*) The 27th section enacts that "No sheep shall be brought across the boundary from any adjoining colony until the owner shall have first procured from some inspector a certificate under his hand that such sheep are not infected, and stating that to the best of his knowledge and belief, they have not been dressed or dipped for scab during six months previously, and have not during the same period passed through any infected run or come in contact with any infected sheep. And the inspector at or nearest to the place at which it is intended that any sheep shall be so brought across such boundary, shall examine such sheep and obtain all necessary information respecting them, and shall give such certificate in all cases where the same shall be in accordance with the requirements aforesaid."

The 28th section directs that "As soon as any sheep shall have passed any such boundary, the owner shall obtain from the inspector, and he is hereby directed to give in addition to the certificate aforesaid, a permit in writing under his hand permitting such sheep to travel by the nearest practicable and ordinarily used public way, to some place to be specified in such permit, and any owner may thereupon travel such sheep by such public way to such place, but not otherwise. And such sheep shall not be removed during the whole period of six months after passing such boundary from such specified place, except by virtue of a renewal of such permit, or a new like permit under the hand of an inspector, specifying in like manner the place to which such sheep are to be further removed. And any owner shall incur a penalty of twenty pounds for every day he shall allow such sheep to travel without such original or renewed permit, and shall further incur a penalty not exceeding one hundred pounds for any deviation from the public way aforesaid."

having been a continuation of the offence charged in the previous case, and one and the same transaction.

1866.

Ex parte
GREEN.

It is submitted that the offence with which the defendant was charged on the two occasions was one and the same offence. The obligation to obtain a permit under the 28th section only applied where a certificate had been obtained under the 27th section. The offence therefore of not obtaining a permit could not have been committed, because, as had already been decided by the justices in the preceding case, no certificate by an inspector that the sheep are not and have not been infected had been given. The words of the 28th section are, "As soon as sheep shall have passed any such boundary, the owner shall obtain from the inspector, and he is hereby directed to give, in addition to the certificate aforesaid, a permit in writing." Those words cannot be construed to apply to cases where the sheep have been illegally brought across without a permit.

Stephen showed cause. It is absurd to argue that because an owner has broken the law and brought sheep across the boundary without obtaining a certificate, the same wrong doer shall be allowed to travel his sheep without a permit. Shall a man be allowed to obtain an advantage by means of or as a consequence of his own wrong? It is clear what must have been the intention of the Legislature; and it is submitted that the words used sufficiently disclose that intention, for the section says "as soon as *any* sheep shall have passed," &c., the owner shall obtain a permit.

Darley replied.

STEPHEN, C. J. I was at first inclined to think that the present was a *casus omissus*. But on further consideration, I am of opinion that the particular act of allowing these sheep to travel without a permit is an offence within this section. The 28th section applies to sheep illegally brought over the border, as well as to those in respect of which a certificate shall have been given. The section, doubtless, contemplates only the giving of a permit where a certificate has been given.

1866.

Ex parte
GREEN.

But the words are large enough to include also the case where no certificate has been given. Was not the act complained of within the mischief proposed to be guarded against? We should not respect the letter, but rather the spirit of the enactment. There is no doubt that the defendant allowed sheep to travel without any permit whatever. It has been argued that the defendant would not be entitled to demand such permit because he was without a certificate. How, it is asked, could he obtain a permit in addition to a certificate? The certificate is only to be given if the sheep are examined. The permit is only to be given where a certificate has been given. A certificate cannot be given in the present case; and, therefore, the Legislature could not have intended that a permit should be necessary. The answer to this argument is that it is the defendant's fault that he cannot get a permit. I should think that in a case like the present an Inspector might give a permit. It cannot be supposed that the Legislature intended that a person having paid the penalty of five shillings a sheep for not obtaining a certificate of freedom from infection, should afterwards be allowed to travel the same sheep all over the colony. The defendant ought not to be allowed to say that because he has committed one illegality, he may, therefore, commit another. But my present opinion must not be taken as free from difficulty. I may add that I think it was a harsh proceeding to punish the defendant for the same thing on two occasions.

CHEEKE, J., concurred.

FAUCETT, J. I regret to differ from my brother Judges. But it seems to me that the 27th and 28th sections must be taken together, and they direct that after sheep are crossed and a certificate given, a permit shall be obtained. I see nothing in the Act compelling an inspector to give such permit, except in cases where upon the sheep being crossed a certificate has been obtained. It seems to me to be a *casus omissus*.

Prohibition granted.

1866.

THE QUEEN *against* BURFORD.

March 31.

SPECIAL case reserved for the consideration of the Court, under 13 Vic., No. 8.

"Tamworth Quarter Sessions, Wednesday, March 7, 1866.

"The prisoner was arraigned upon the information, a copy whereof is hereto annexed (*a*), and pleaded not guilty, whereupon he was tried and the jury found that the prisoner was not guilty of giving information to *Dunn* or his accomplices; that he was guilty of withholding information to the police; and that he was guilty of giving false information to the police. After verdict pronounced, Mr. *Wisdom*, the counsel for the prisoner, moved that the judgment should be arrested on the grounds:—1st. That the verdict ought to have been upon the whole indictment. 2nd. That the indictment

In informations framed under the Felons Apprehension Act, for giving information to the accomplice of any proclaimed outlaw, the accomplice ought to be named, or it ought to be alleged that his name is unknown.

(*a*) The information was as follows, that "one *John Dunn* being and having been duly adjudged and proclaimed an outlaw within the meaning of the Felons' Apprehension Act, *Joseph Burford*, on the 5th day of December, 1865, at Buckingar, in the colony, &c., did feloniously, voluntarily, and knowingly, directly and indirectly give and cause to be given to him, the said *John Dunn*, and his accomplices, information tending and with intent to enable him to escape from justice; and did withhold information, and gave false information concerning such outlaw to the police in quest of the said outlaw, against the form of the statute in such case made and provided."

The section under which this information is framed is the 4th of the Felons' Apprehension Act, 28th Vic., No. 2 and is as follows:—"If after such proclamation any person shall voluntarily and knowingly harbour, conceal, or receive, or give any aid, shelter, or sustenance to such outlaw, or provide him with firearms or any other weapon, or with ammunition, or any horse, equipment, or other assistance, or directly or indirectly give or cause to be given to him or any of his accomplices information tending or with intent to facilitate the commission by him of further crime, or to enable him to escape from justice, or shall withhold information or give false information concerning such outlaw from or to any officer of police or constable in quest of such outlaw, the person so offending shall be guilty of felony, and being thereof convicted, shall forfeit all his lands as well as goods, and shall be liable to imprisonment with or without hard labor for such period not exceeding fifteen years, as the Court shall determine; and no allegation or proof by the party so offending that he was at the time under compulsion shall be deemed a defence, unless he shall, as soon as possible afterwards, have gone before a Justice of the Peace or some officer of the Police Force, and then to the best of his ability given full information respecting such outlaw, and made a declaration on oath voluntarily and fully of the facts connected with such compulsion."

1866.
The QUEEN
v.
BURFORD.

is bad for not naming the accomplices, or stating that their names are unknown to the Crown Prosecutor. 3rd. That the indictment is bad for duplicity.

"These points I have reserved for the consideration of the Supreme Court.

F. W. MERMOTT, Chairman."

The *Solicitor-General* for the Crown. [*Stephen, C. J.* The first part of the information is immaterial, because the prisoner is acquitted as to that, except so far as it may be looked at in considering the question of duplicity. It is also unnecessary to consider the point as to the naming the accomplice, because there is an acquittal of that portion of the charge]. It is submitted that the alleged duplicity is cured by verdict. In *Archbold* (a) it is said that "in criminal cases the defendant may object to [duplicity] by special demurrer, perhaps also upon general demurrer, or the Court in general, upon application, will quash the indictment. But it is extremely doubtful, whether it can be made the subject of a motion in arrest of judgment or of a writ of error; and it is cured by a verdict of guilty as to one of the offences and not guilty as to the other."

No counsel appeared on behalf of the prisoner.

STEPHEN, C. J. This information is very inartificially and incorrectly drawn; and if it had been before us on writ of error (assuming that a writ of error would lie), I am not prepared to say that we should not have been bound to reverse the judgment on account of these defects.

The first objection taken is, that the verdict ought to have been on the whole information. But the jury have said that as to one half of the information the prisoner is not guilty; and as to the other half he is guilty. It seems to me, therefore, that the foundation of this objection fails.

The second objection is, that the information is bad for not naming the accomplice. I am clearly of opinion

(a) p. 55.

that this is a good objection in itself; and if the prisoner had been found guilty on the whole information, the whole judgment would have been for this reason bad. But as the jury have acquitted the prisoner on this portion of the information, namely, the giving information to *Dunn* or his accomplices, there is no point of this kind in his favour. It is clear that it is necessary to name the accomplice, for how otherwise can the prisoner know the charge he is called on to meet. The accomplice, therefore, ought to be named in the information, or at all events it ought to be alleged that his name is unknown.

On the point as to duplicity, the information would have been better if one count had charged the prisoner with withholding information, and the other count with giving false information. But I do not think the information is bad for duplicity, because these offences are in my opinion of the same kind. I think the information is unsatisfactory, loose, and slipshod. I notice it alleges nakedly that the prisoner gave false information "to the police;" whereas it should have stated that he gave false information to A. B.; the said A. B. being an officer of the police in quest, &c. It is also altogether incorrect to speak of withholding information "to" the police.

CHEEKE, J., concurred.

FAUCETT, J. The withholding information and the giving false information might be two offences. If it occurred on one occasion, the two offences might be joined in one count. But if the withholding information took place on one day, and the giving false information on another day, it seems to me that there ought to have been two counts.

STEPHEN, C. J., added. There should have been separate counts. The giving information to a felon is one offence; to accomplices is another offence; and it would be safer to insert the giving false information,

1866.

The QUEEN
V.
BURFORD.

1866.
The QUEEN
v.
BURFORD.

and the withholding information, in two distinct counts; and this would also be more fair to the prisoner (a).

September 1,
1865.

THE QUEEN *against* ARKON (b).

Some rings and other property were stolen on the 11th October, 1864, from L's house at Tamworth, and on the 25th January, 1865, some of the stolen property was found in the possession of the prisoner. The prisoner was seen near L's house on the 11th October, 1864, and lodged in the neighbourhood for two months about that time. *Held*, that there was sufficient evidence to support the verdict of the jury that the prisoner was guilty of receiving the stolen property.

SPECIAL case reserved for the consideration of the Judges, under the 13 Vic., No. 8.

"The prisoner *Arkon*, a Chinese, was tried before me at the Court of Quarter Sessions, holden at Tamworth, on the 27th June, 1865, on an information containing two counts; the first count charging the prisoner with stealing certain rings, opium, and a watch and chain, the property of one *Levy*; the second count charging the prisoner with receiving the said property, knowing it to have been stolen. It was proved that on the night of the 11th October, 1864, certain property was stolen from the house of the said Mr. *Levy*, of Tamworth; on the 25th January last, some property was found in possession of the prisoner, and one ring in particular was sworn to as being of the property stolen from the said Mr. *Levy*; other rings found in the possession of the prisoner were stated by the said Mr. *Levy* to be, according to his belief, his property. Mr. *Levy* swore that he believed he saw the prisoner near his store on the 11th of October, and a Chinese swore that the prisoner was at his house in October, and as I understood the evidence, that he lodged there for two months, and worked in a garden. The prisoner stated that he was not in Tamworth, and that he bought the rings in Sydney. The rings were of an ordinary description.

"I directed the jury that the possession of the property by the prisoner was sufficiently recent from the time that it was stolen to throw upon the prisoner the

(a) See *Heywood's* case, 33 L. J. M. C. 133; *Lonsdale's* case, 4 F. & F. 56.

(b) Before *Wise, J., Hargrave, J., and Cheeke, J.*

burden of satisfactorily accounting for such possession, and if this were not done, they could, on the evidence given, convict the prisoner on either count of the information. Having doubt whether the possession of the property was sufficiently recent from the time of it being stolen; and also, whether from the circumstances proved there arose a presumption that the prisoner had received the goods, or any of them, knowing them to have been stolen, I reserve these questions for the opinion of the Supreme Court. The jury found the prisoner guilty on the second count and acquitted him on the first count, and I passed sentence accordingly. I respectfully submit to the Supreme Court the question whether the prisoner ought to have been convicted?

1865.
The QUEEN
v.
ARKON.

“EDMUND SHEPPARD,

“Deputy Chairman of Quarter Sessions for the Northern District.

“Tuesday, June 27th, 1865.”

No counsel appeared for the prisoner.

Per Curiam. The case is within the principle of *Langmeid's* case (a). There was evidence for the jury on which they might convict the prisoner.

Conviction sustained.

THE QUEEN *against* CROOKWELL and others.

June 5.

SPECIAL case reserved for the consideration of the Judges, under the 13 Vic., No. 8.

The prisoners were found guilty before *Cheeke, J.*, of the murder of a constable. The prisoners were all in charge of the deceased and other constables under escort; and were being removed from Berrima Gaol to Sydney Gaol by virtue of a removal warrant. One of the prisoners alone fired the shot. The case against the others was, that they were all engaged in the same common design to escape, and to carry that out by any means

Where a constable in lawful charge of a number of prisoners, is killed by one of them, in the prosecution of a common design to escape, at all hazards, it is murder.

(a) 1 L. & C. 427.

1866.

The QUEEN
v.
CROOKWELL
and others.

and at all risks. But there was no evidence to show for what crimes the prisoners were or any one was under imprisonment in the gaol. At the request of Mr. *Windeyer*, counsel for the prisoners, two points were reserved for the consideration of the Court. 1. Whether the transmission warrant duly proved was sufficient evidence as to the prisoners being in lawful custody of the sergeant of police who had command of the escort. 2. Whether the jury ought not to have answered specifically the question put to them in writing at their request, or whether they were entitled to return a general verdict (a).

Windeyer for the prisoners, referred to *Russell's C. & M. (b)*; *Hawkins' P. C. (c)*; 4 Vic., No. 29, s. 17, and 17 Vic., No. 1, s. 2.

The *Solicitor-General* for the Crown cited *Plummer's case (d)*.

STEPHEN, C. J. I am clearly of opinion against the prisoners on both points. The jury, though they would not answer the questions categorically, must be taken to have found first, that all the prisoners had one common design; and, secondly, that in its prosecution, there was a resolution in all to accomplish it by all means, and at all risks; and, thirdly, that the killing occurred in the prosecution of that common design. Now, that design was an unlawful one. It follows that all so engaged were guilty of murder.

HARGRAVE, J. The warrant was, in my opinion, sufficient evidence of the lawful custody. The Judge has no power to compel a jury to answer specific questions.

CHEEKE, J., concurred.

Conviction sustained.

(a) Before retiring, the foreman asked his Honor to write down the points for their considerations to enable them more clearly to arrive at the verdict. His Honor thereupon wrote and handed to the jury the following questions. 1. Did *Crookwell* fire the shot that killed *Raymond*? 2. Were all the prisoners engaged in an unlawful design to escape, and if not all of them, which of them? 3. Did those engaged in this unlawful design to escape, intend to carry it out, entertaining the common guilty purpose of resisting to the death, or with extreme violence, any persons who might oppose them?

(b) 1 vol. 592, 736, 743. (c) Bk. 2, Ch. 19, s. 14. (d) Keb. 109.

1866.

THE QUEEN *against* BRITCHER (*a*).

June 22, 1866.

SPECIAL case reserved for the consideration of the Court, under the 13 Vic., No. 8.

"The defendant in this case was tried before me at the last criminal sittings at Darlinghurst, upon an information containing three counts.

"The first count charged him—under the 73rd section of the Insolvent Act, 5 Vic., No. 17—with having, before the sequestration of his estate, by false pretences and representations, contracted a debt.

"The false pretences alleged, were that he represented to one *James Antrobus*, then being an officer of the Commercial Banking Company, that he (the defendant) was then possessed of certain land situate at the Glebe and Balmain (meaning thereby that he was the owner of the said land), of the value of £5000; and that he (the defendant) afterwards represented to one *William Neill*, then being an officer of the said company, that certain deeds then and there presented by the defendant to the said *William Neill*, and which the defendant then and there informed the said *William Neill* were the title deeds of and relating to the said lands, were all free (meaning that no portion of the said lands was charged

A. was charged in the first and second count, under s. 73 of the Insolvent Act, with contracting a debt fraudulently, by falsely pretending to the manager of a bank that he was possessed of certain land, of the value of £5,000, and that certain deeds then presented by him, were the title deeds of such land, and were all free and a perfect security for the repayment of certain sums of money which *A.* had asked the bank to advance. He was also charged in a third count of obtaining money by false

pretences under the 7 & 8 Geo. IV., c. 29. It appeared that in December 1864, *A.* applied to the manager of the bank for a cash credit of £600, and offered to deposit as security the deeds of certain property; and the application was granted. When he deposited his deeds, and while the names of his proposed sureties were being taken down, he said the deeds were a perfect security in themselves for more than he wanted; but the usual surety bond not having been executed, *A.* was allowed to overdraw to that extent, the old account current being continued. The balance against him in this manner varied, sometimes being very small, and on two occasions the balance was in his favor. About March 1865, *A.* applied for a further cash credit of £400, and offered to sign a lien on the property. Before he signed it *A.* stated to the manager that these properties were his and unencumbered; that all the deeds were safe and the properties quite free. The cash credit of £400 was then allowed as before on the faith of the deeds deposited. In fact *A.* had before the application for the first cash credit, mortgaged the property to *D.* for £400, but this mortgage was unregistered; and he had also made a voluntary settlement of the same property, which was registered. The jury having convicted *A.* on the three counts, finding specially that *A.* made a false representation, both with regard to the mortgage to *D.* and also the settlement, and contracted a debt thereby, the Court set aside the verdict on the third count, but sustained the verdict on the first and second counts.

(*a*) Before *Stephen*, C. J., and *Faucett*, J.

1866.

The QUEEN
v.
BRITCHER.

with or liable to any mortgage or debt, or otherwise encumbered); and that the said deeds were, in themselves, a perfect security for the repayment to the said company of certain sums of money which the defendant had applied to the said company to lend and advance to him.

“The second count was the same as the first, differing only in the amount of the debt.

“The third count was the common count for obtaining money by false pretences.

“The evidence was to the following effect:—

“The defendant had been for some time a customer of the Southern (the Haymarket) Branch of the Commercial Banking Company—depositing moneys, and drawing by cheques against the moneys so deposited, in the usual way.

“In the latter part of December 1864, the defendant applied to Mr. *Antrobus*, the manager of the Southern Branch, for a cash credit, and said that he would deposit as a security his deeds of certain property at Balmain, the Glebe, and Petersham. Mr. *Antrobus* told him he would have to apply to the Board by letter. Accordingly, on the 4th of January, 1865, Mr. *Antrobus* received from the defendant a written application proposing two sureties, as required by the bank, which application was duly forwarded to the Board.

“On the next day Mr. *Antrobus* informed the defendant that his application was granted, and that he would have to deposit his deeds at the head office, and sign the usual bond.

“On the 6th of January, 1865, the defendant accordingly called at the head office, and deposited the deeds with Mr. *Neill*, the secretary; and while Mr. *Neill* was taking down the names of the proposed sureties, the defendant stated that the deeds were a perfect security in themselves for more than he wanted. The sum, it appears, he at that time wanted was £600—the amount mentioned in the first count.

“One of the proposed sureties refused to sign, and the bond was never acted on.

"But the same day, or a day or two after, the defendant told Mr. *Antrobus* that he wished to draw, as he wanted the money. Mr. *Antrobus* asked if he had deposited the deeds. He said he had. Mr. *Antrobus* then told him that he might draw.

"He accordingly drew until the balance against him amounted to £600.

"The usual course at the bank, when a cash credit is granted, and the bond with sureties is regularly executed, is to open a cash credit account, separate and distinct from the ordinary account current of the customer, and also to take a promissory note for the amount of the proposed credit. The promissory note is taken to enable the bank to sue more readily if necessary. On this occasion, the sureties not having executed the bond, there was no separate cash credit account opened, but the old account current was continued, and the defendant from time to time deposited moneys, which were placed to his credit in this account, and drew cheques, which were placed to his debit. The balance against the defendant in this manner varied, sometimes being very small, and on two occasions the balance was in his favour; but the adverse balance eventually, on the 6th of April, amounted to £680—i.e., £80 beyond the amount of the cash credit. The debt of £600 so contracted was the debt mentioned in the first count.

"The defendant was allowed to draw to this extent 'on the faith of the deeds—on that security as represented by himself.'

"About March 1865, the defendant told Mr. *Antrobus* that he would require about £400 more. Mr. *Antrobus* said he would advance the £400, and would prepare a lien on the properties.

"Accordingly a document was prepared, and signed by the defendant, dated the 6th of April, 1865, which is in evidence.

"Mr. *Antrobus* says 'the day he signed this document, and before he signed it, I said to him, 'are these properties yours and unencumbered?' The defendant said 'yes, they are,' or something to that effect. In his

1866.

The QUEEN
v.
BRITCHER.

1866.

The QUEEN
v.
BRITCHER.

cross-examination Mr. *Antrobus* said, 'are these properties yours and free,' or 'unencumbered.' The defendant said, 'all the deeds are quite safe, it is my own property and free,' or something to that effect.

"The further sum of £400, being the debt mentioned in the second count, was then advanced in the same manner as before, and also on the faith of the deeds deposited. In this manner the balance against the defendant considerably exceeded £1000. The defendant gave promissory notes to cover the amount of £1000.

"On the 9th of December, 1864, the defendant had mortgaged one of the properties mentioned in the deeds deposited with the bank for the sum of £400, to a person of the name of *Davis*. Mortgage of that date is in evidence. And on the 16th of April, 1864, the defendant had made a settlement to trustees in favor of his wife, of all the properties mentioned in all the deeds deposited with the bank. Under this latter deed one of the trustees took possession in August 1865, and still holds possession. The trustees never got the title deeds.

"No evidence was given as to the value of the lands.

"The rule *nisi* for the sequestration of the defendant's estate was dated 28th August, 1865. The rule was made absolute on the 5th September, 1865.

"Mr. *Blake*, of counsel for the defendant, took the following objections:—1. That no debt was proved within the meaning of the 73rd section of the Insolvent Act, 5 Vic., No. 17—a balance of account in the manner proved not being such a debt. 2. That the representations proved merely amounted to a warranty or guarantee of title, and therefore could not be a false pretence or representation under the same section. 3. That the representations, being a mere assertion of title, and therefore a statement of what is a mixed matter of law and fact, could not be a false representation within the same section.

"These objections were made to the first and second counts. The same objections were made generally to the third count.

“ These objections I overruled ; but, at Mr. *Blake*’s request, I reserved the points for the consideration of the full Court.

1866.

The QUEEN
v.
BRITONER.

“ The jury found the defendant guilty, and in reply to specific questions put by me they found—1. That the defendant made a false representation with respect to the mortgage of the 9th December, 1864. 2. That he made a false representation with respect to the settlement of the 16th of April, 1864. 3. That he contracted a debt by means of the said false representations, jointly and severally. 4. And as to the third count, that he obtained the money by false pretences.

“ The question submitted for the consideration of the Court is, whether I was right or not in overruling Mr. *Blake*’s objections.

P. FAUCETT.”

Blake for prisoner. There was no false representation, as it respected the bank, of either title or right to incumber. For the previous mortgage to *Davis* was not registered ; and as the bank had no notice of it, their security, if registered, would have had priority. It was in the power of the bank to have obtained a perfect mortgage, and the defendant’s withholding from them information as to *Davis*’ mortgage, was the proper way of enabling the bank to perfect their title by registration. The settlement, although registered, was voluntary, and therefore void as against a subsequent purchaser for value like the bank. A Court of Equity will compel a purchaser to take a title as unencumbered, if there is only a voluntary settlement. The prisoner represented that the property was “ unencumbered,” a proposition involving matter of law rather than of fact. But, as it respects the bank, the property, in legal effect, was unencumbered, and so his allegation was *true*. If, however, the assertion was false, it was an assertion of a mixed matter of *fact* and *law*. The word “ encumbered” depends upon the reading of various statutes, and is matter of law rather than of fact, and so the case is within *R. v. Lotze* (a), and *Gardner*’s

(a) 4 Sup. Ct. R., C. L. 86.

1866.
 The QUEEN
 v.
 BRITCHER.

case (a). In the latter case, the prosecutrix had been induced to board and lodge the prisoner by a false representation that he was a naval officer; but the Court considered the supply of articles upon the contract made by reason of the false pretence, was *too remotely* the result of the false pretence to support the indictment. But again; what was the specific money obtained? the first £50, or the last £50? or when? when finally £600 or the last £400 was obtained?

It is also contended that no money was obtained at all, but only a credit in account—a right to draw in favor of divers persons, under which arrangement the prisoners accordingly did draw. In *Wavill's* case (b), it was held by the twelve Judges, that obtaining credit on account at a bank by means of drawing a bill of exchange, which had no chance of being paid, was not within the Act, although the bank paid money in consequence thereof, which they would not otherwise have paid. That is the present case; the defendant did not obtain any specific sum by his representations; all that was obtained by him was credit in account; other persons received the money. Suppose that he had executed a legal mortgage with a covenant that he had a title and right to convey; the covenant would not have amounted to a false pretence; *Codrington's* case (c). Why, then, a similar assertion *without* a covenant? [*Stephen, C. J.* Where there are several counts charging different offences, if the judgment be entered up generally upon all, and it appears that any count is bad in law, the judgment is bad; *O'Connell's* case (d); but there is no difficulty of that kind here, because all these three counts are good in point of law, although the conviction on one of them cannot be sustained.]

Butler for the Crown. Any misrepresentation of one fact which (though in *part* only) induces the prosecutor to give his money is enough. Here the assertion was that the prisoner's deeds were not under any charge.

(a) *Dears. & Bell*, 43 : 25 L. J. M. C. 100.

(b) *R. & M.* 224.

(c) 1 C. & P. 662.

(d) 11 C. & F. 155.

The information is founded on the 73rd section of the Insolvent Act, which provides for the case of any insolvent contracting any debt fraudulently or by means of any false pretence or representation, the language of which, as relating to mercantile morality, was intended to have a much more extended operation than the 7 & 8 G. IV., c. 29. Even under that statute it has been held that a misrepresentation of a matter of fact, accompanied by a promise, did not prevent the statute applying; *R. v. West (a)*.

1866.
The QUEEN
v.
BRITCHEL.

STEPHEN, C. J. The conviction on the third count, which is framed on Sir *R. Peel's* Larceny Act, cannot be sustained. For no money or goods were here obtained by the false pretences, but only a credit in account. *Wavell's* case is an express authority on this point. But on the first and second counts, which are framed on the Insolvent Act, s. 73, the conviction is right. By means of a false representation that the land was not under or charged with any mortgage or debt whatever, he contracted (*i.e.* fraudulently contracted), a debt with the bank. That is the exact offence assigned in the enactment. Now, this being so, we need not consider whether the prisoner contracted the debt by means of a false pretence or not; or whether the false pretence alleged be a false pretence within the Larceny Act. But as it respects the particular false pretences or representation that there was *no charge on the land*, I am disposed to think that that was a representation of a mere matter of fact; so that this case is distinguishable from *Lotze's*, where the representation or assertion by the prisoner related to matter of *right*, and so included necessarily a question of law.

FAUCETT, J. I am of the same opinion. The third count was not supported by the evidence, as in *Wavell's* case. But the conviction on the first and second count is, in my opinion, good. The insolvent Act being intended to deal with commercial transactions, enables the Court to inquire into the conduct of the party before he

(a) 27 L. J. M. C. 227.

1866.

The QUEEN
v.
BRITCHER.

was insolvent, and a less rigorous construction should be applied to its provisions. It appears that in December, 1864, the defendant mortgaged a property for £400, and in the same month he, by falsely representing to the bank that his property was not charged with any mortgage, induced the bank to extend his credit. The information charges that his estate having been sequestered, the defendant, before his sequestration, fraudulently contracted a debt; the other allegations in the information are statements of the means by which the defendant thus fraudulently contracted. The jury have found that these statements are false; and in my opinion, they amount to legal fraud. It has been contended that *Davis'* mortgage not having been registered, might have been rendered valueless if the bank had taken the proper steps; and that the bank merely suffered a loss caused by of its own negligence. The Court cannot enter into considerations of this kind. It is immaterial whether or not the bank acted carelessly, if the defendant committed a fraud and thereby induced the bank to give him credit. This mortgage to *Davis* at the time of the negotiations with the bank, was a valid existing mortgage. *Davis* was entitled as against the defendant to hold the security for £400, and it was only the subsequent conduct of the bank which could render that security valueless; and therefore the representation that there was no charge was false and fraudulent.

Conviction on the first and second counts sustained; conviction on the third count quashed.

1866.

THE AUSTRALIAN JOINT STOCK BANK *against* THE
ORIENTAL BANK.

June 18,
August 2.

SIR W. MANNING, Q.C., and *Butler*, on behalf of the plaintiffs, moved for an order to restrain the defendants from setting up as their defence the loss of the bank notes declared on, upon indemnity being given to the satisfaction of the Court, &c., against the claim of any other person than the plaintiffs upon the said notes, under the 53rd section of the Common Law Procedure Act of 1857. But the difficulty which will be suggested is that all the notes are payable to the bearer on demand at the Sydney office, and that therefore until presentation they are not liable to pay. All the notes sued on have been proved to have been stolen from one *Kater*, a clerk in the plaintiffs' bank, in July, 1863, when the Mudgee mail, in which *Kater* was a passenger, was robbed by some bushrangers, and since that time, that is, more than two years ago, none of these notes have been discovered. It is admitted that at common law an action cannot be maintained on a lost bill against the acceptor, unless the bill be delivered up, although the plaintiff offers an indemnity; and that until recently the owner had no remedy except in a Court of equity; *Hansard v. Robinson* (a). But the 53rd section of the Common Law Procedure Act was intended to remedy this defect. In *Edge v. Bumford* (b), which will be relied on, the drawer of a bill which had been accepted sent it to the plaintiffs in part satisfaction of a debt due to them. The bill not being indorsed, the plaintiffs returned it to the drawer for indorsement. He burnt it and became bankrupt. The plaintiffs filed a bill against the acceptor for payment of the money, they offering to indemnify him in respect thereof, and the bill was dismissed, because there was no privity between the parties. In *Wright v. Lord Maidstone* (c), relief was refused, because the bill

In an action upon certain bank notes made by the defendants, payable to bearer on demand at the defendants' office, at S., and lost before present action, the Court (*Stephen, C.J., dissentiente*) made an order—under the 53rd section of the Common Law Procedure Act of 1857—restraining the defendants from setting up as a defence the loss of such notes, upon indemnity given.

(a) 7 B. & C. 94.

(b) 9 Jur. N.S. 8; 31 L.J. Ch. 805.

(c) 1 Kay & Johns. 701; 24 L.J. Ch. 623.

1866.
 The
 AUSTRALIAN
 JOINT STOCK
 BANK
 v.
 The
 ORIENTAL
 BANK.

was destroyed, and the plaintiff therefore had a sufficient remedy at law. The decision of the Irish Court of Exchequer in *M'Donnell v. Murray* (a), is precisely in point and will be followed. In that case an action was brought upon certain bank notes of the Provincial Bank of Ireland, payable to bearer on demand at Newry, which had been lost, and the Court made the order now asked for upon a sufficient indemnity having been given. The argument arising from inconvenience was suggested in the course of the argument, as it will be here. *Pigot*, C.B., in his judgment says, "According to the argument, the mischief existing in the case of so large a class of promissory notes as bank notes should be treated as excluded; but how far is that to go? It was said that there was a great inconvenience in imposing upon banks the necessity of preserving a record of their own acts, and employing a number of clerks to determine, whenever any instrument was presented for payment, whether the security existed or not; and that this liability might continue for an indefinite time, though a demand might not be made for, say, twenty or thirty years. But that inconvenience would equally exist in the case of everybody who gets an indemnity for an instrument payable on demand." And *Greene*, B., says, "Even though this difficulty may exist in certain cases, I would be disposed to say that that might be a reason for a Court not interfering, in the exercise of its discretion, in a particular case, rather than for taking away the power of the Court to interfere in the case of large bank notes." The notes were, in that case, payable on demand at Newry, and is in point with the present. *Norton v. Ellam* (b) is cited by *Byles* (c) as an authority that presentment is not in general necessary for the purpose of charging the maker of a promissory note; because the action itself is a sufficient demand, even though the note is made payable on demand. The debt arises at the time of the date, not on the demand, although the note is not to be considered overdue without some evidence of payment having been demanded and refused; *Brooks*

(a) 9 Ir. C.C.L.R. 502. (b) 2 M. & W. 461. (c) p. 185.

v. Mitchell (a), Cripps v. Davis (b), Barough v. White (c). It is submitted, therefore, that a demand is enough without presentment. The case comes within the principle laid down by Lord *Redesdale* in *Davis v. Hone (d)*. "A Court of Equity," says he, "frequently decrees specific performance, where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious, that the agreement should be performed." On the question of costs, *Hawkins v. Carr (e)* was referred to.

1866.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

Darley and Salamons showed cause. It is submitted that the presentment at the office in Sydney is essential; *Sanderson v. Bowes (f)*. *Howe v. Bowes (g)* shows the absolute necessity of presentment, in order to give a complete cause of action. In all cases where the instrument is made payable at a particular place by the party to be charged, that presentment must be averred in the declaration, and that averment must be proved. The plaintiffs, therefore, having no cause of action, are not within the 53rd section of the Common Law Procedure Act; in the words of *Martin, B.*, in *Noble v. The Bank of England (h)*, "I apprehend that section applies where an action can be maintained, notwithstanding the loss of the note. In that case a Judge can give relief; but if no action can be maintained, the plaintiff is not within the section." The necessity of presentment has been recognised in the recent cases of *Sands v. Clarke (i)*, and *Vander Donckt v. Thelluson (k)*. In the former case, *Maule, J.*, in delivering judgment says, "It is clear that the presentment of the notes at 'the place specified' is, by the notes, made a condition precedent to the defendant's liability to pay; and equally clear that it must be performed before he can be charged, unless the defendant has himself discharged the condition, or

(a) 9 M. & W. 15.

(c) 4 B. & C. 327.

(e) 35 L. J. Q. R. 81.

(g) 16 East 112; S. C., in Ex. Ch.; 5 Taunt 30.

(h) 33 L. J. Ex. 81.

(b) 12 M. & W. 165.

(d) 2 Sch. & Lefr. 347.

(f) 14 East 500.

(i) 8 C. B. 751.

(k) 8 C. B. 812.

1866.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

dispensed with its performance." He referred to *Chitty (a)* and *Byles on Bills (b)*. In all the cases the cause of action was complete, and the only difficulty was the nonproduction of the instrument as a voucher. No case can be cited in which a Court of Equity has given relief, unless the cause of action was complete; and the statute gives no greater jurisdiction than that exercised by a Court of Equity. The defendant is to be prevented from pleading the loss, leaving to him any other defence he may possess. A Court of Equity, says *Story*, will grant relief in the case of a lost note negotiable, but not negotiated, and lost when overdue (*c*); *Ex parte Greenway (d)*, *Davies v. Dodd (e)*, *Mucartney v. Graham (f)*, *Cocknell v. Bridgman (g)*. In *M'Donnell v. Murray* it is clear that the point now raised was not taken, or in any way considered.

The matter is, at all events, for the discretion of the Court. If the present application is successful, any difficulty that might arise from defects on the face of a negotiable instrument will be easily avoided by its being lost. *Penard v. Klockman (h)*, *Saul v. Jones (i)*, and *Aranguren v. Scholfield (k)* were referred to.

Sir W. Manning replied.

Cur. adv. vult.

August 2.

Their Honors now gave judgment as follows:—

STEPHEN, C.J. It is with regret that I have arrived at a conclusion unfavourable to the plaintiffs' application; but it appears to me, that the enactment (section 53 of our Common Law Procedure Act, corresponding with section 87 of the English), does not extend to a case of this kind.

I entertain no doubt, that bank notes payable to the bearer are negotiable instruments, within the meaning of the statute; that the notes declared upon have been stolen from the plaintiffs, and that few if any of them

(a) 103. (b) 173. (c) 1 St. Eq. J., § 86 a. (d) 6 Ves. 812.
(e) 4 Pr. 176. (f) 2 Sim. 285. (g) 4 Beav. 493.
(h) 3 B. & S. 388; 32 L.J.Q.B. 82.
(i) 1 E. & E. 59; 28 L.J.Q.B. 37. (k) 1 H. & N. 494.

will ever be recovered; or, that, should it turn out otherwise, ample security can be given to indemnify the defendants against the consequences. Nor do I feel embarrassed, because of the great number of the missing instruments; for the remedy, if it exist at all, must equally be applicable, whether the notes lost be few or many. But the objection which strikes my mind as insuperable is this: that the enactment can only be taken to apply, where the plaintiff—having a cause of action complete in itself, on a negotiable instrument—labours solely under the difficulty of inability to produce it at the trial. In cases of that kind, the statute effectually and very properly affords relief, by preventing the loss from being set up, in any manner; whether by plea or otherwise. Here, however, the plaintiffs had no cause of action on the notes, as I conceive, until after actual presentation of them for payment, at the place named; *Saunderson v. Bowes* (a), *Sands v. Clarke* (b), *Vander Donck v. Thelluson* (c), *Dickinson v. Bowes* (d), and *Bowes v. Howe* (e). But the proposed order in restraint of the defendants would, in effect, dispense with the performance of that condition precedent; and thus, after action brought, confer on the plaintiffs a right not existing previously.

The order would no doubt only be, in terms, following those used in the enactment, that the defendants shall not “set up the loss” of the instruments. But this, it may well be argued (see *Hoppe v. Single*) (f), will operate to the extent suggested. For the loss of the notes is not only not to be pleaded. It is not to be set up; that is, taken advantage of in any way. But, if so, their non-presentation, which was rendered impossible by the loss, could not be taken advantage of. Now the declaration shows, that the notes were only payable “on demand at the office of the bank, in Sydney”—and there is no allegation of presentment there. But, by the order, these defendants would be restrained from demurring;

1866.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

(a) 14 East 507.

(c) Ibid 820.

(e) Exch. Ch.; 5 Taunt. 33.

(b) 8 C. B. 758.

(d) 16 East 111.

(f) 2 Sup. Ct. R., C.L. 88.

1866.
 The
 AUSTRALIAN
 JOINT STOCK
 BANK
 v.
 The
 ORIENTAL
 BANK.

and equally, of course, from pleading the fact of non-presentment. In point of fact, the declaration has recently been amended by alleging presentment. This allegation, therefore, although false, cannot be denied. Such a prohibition, as I think, for the reason already given, could not have been intended by the statute. If, on the other hand, the effect of the order when made will only be co-extensive with its terms, in their strict literal signification, so that the defendants may still on the record set up the non-presentation, it will be useless.

It is unnecessary to consider, whether the prohibition now summarily sought in this Court, under section 53 of the Common Law Procedure Act, could or not be obtained by injunction in a Court of Equity. For the purposes of my present judgment, it is sufficient to say that the statute—as I understand it—has created this peculiar remedy for a particular class of cases only; and that this is not one of them. I may add, however, that I do very much doubt whether such an injunction in a case like this (always assuming that the defendants only undertook to pay on presentation) would be granted. It may be an unwise thing to take a bank note so worded. It is undoubtedly very hard on the taker, should he accidentally lose or destroy such a note, to find that he has thereby lost his money. But if the stipulation really was, that the bank would not pay without actual presentment, I do not see how any Court could relieve him from the necessity of performance.

The case of *M'Donnell v. Murray* (a) is relied on as an authority in support of the application. It is unnecessary to say that the decision, had the point on which this judgment rests been there taken, would have been conclusive. And it may be contended, that the bank notes in that case were in effect, though not in terms, identical with those here. But it will be seen, that the circumstance of their being made payable at a particular place, where (of course) the loss prevented their presentation, was not noticed. Whatever force, therefore, there may be in the observation, that this very omission

(a) 9 Irish C.L. Rep. 502.

tends to show the invalidity of the objection, the authority of the case itself is not against me. My view of the matter may be altogether a mistaken one; but it appears to me to be the safer course, and more in accordance with the rules of law, not without necessity to supplement, and still less to extend the language of this enactment, or so to construe its terms (certainly not the most clear and definite), as to deprive the defendants of their previously existing rights—or, at any rate, to confer a new right adversely to them on their opponents.

1886.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

HARGRAVE, J. There seems to me to be only one question upon which this case must be decided, viz., what is the proper construction of the 53rd section of the Common Law Procedure Act of 1857 (20 Vic., No. 31); that is, whether, under the terms of that section, this Court is excluded from issuing the usual order that the loss of certain bank notes specified in this declaration shall not be set up against the plaintiffs, on their giving the usual and proper indemnity;—the only peculiarity of the present case being that the promise to pay these bank notes is limited to payment “on demand, at a particular place.”

The words of the 53rd section are as follows:—“In case of any action founded upon a bill of exchange or negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or Judge, or the prothonotary, against the claims of any other person upon such negotiable instrument.”

Firstly, it is obvious, and indeed I understand it is admitted, that in this section the Legislature had one general object in view; viz., to prevent defendants who admitted their liability to pay the plaintiffs' demands, except for the loss of the instrument creating such liability, from setting up such loss against the plaintiffs' just demands; and that the power thus given to the Common Law Courts for the advancement of justice in this respect, extends in its general terms to all “nego-

1866.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

tiable instruments." The subject matters of this legislation, therefore, are clearly "negotiable instruments" generally, not any particular class of such instruments, and the loss of all such negotiable instruments is the mischief to be remedied by creating this new Common Law jurisdiction, and clothing the Common Law Court with the statutory power to prevent injustice as between the parties in respect of all such instruments. Upon this first point, therefore, I do not apprehend that there can be, nor is there, any difference of opinion whatever.

In confirmation of this construction of the statute, I should point out that all the authorities relating to the necessity of presenting bills or notes, &c., payable at a certain place, such as the cases in 14 and 16 East (1811 and 1812), the Exchequer Chamber case in 5 Taunton (1813), and the two cases in 8 C.B. (1849) were old established authorities, fully known to the Judges and Legislature antecedently to the Common Law Procedure Act being passed; and as these authorities must have been in the mind of the Legislature when using the general words of this section, it is obvious that the *onus probandi* lies upon the defendants to establish that there is some conclusive reason for *excluding* this particular class of bills and notes from the general words of the Legislature; in other words, the defendants must show that the losers of such bills or notes ought not to be within the protection of the statute, upon some principle of law, justice, or good sense, while the losers of other bills or notes ought to be thus specially protected by the Legislature.

In answer to these arguments, it has been suggested that we must not construe the statute so as to deprive a defendant of a pre-existing right; "that the statute can be only taken to apply where the cause of action is complete, except for inability to produce at the trial." These suggestions are obviously an assumption of the whole point in dispute, for the statute *has* deprived defendants of pre-existing rights, and *has not* used any such words of limitation "to the trial;" but enacts generally that

whenever an action is *founded upon* a negotiable instrument, the defendant shall not be allowed to set up the loss of such instrument where the plaintiff gives a proper indemnity; that is, that the defendant shall neither directly nor indirectly, in any part or step of the proceedings of such action, take advantage of any inequitable defence founded upon the loss of the instrument upon which he admits that, except for the loss, he would be liable in law and equity to pay the plaintiff's demand.

Again, the words used by the Legislature as to "not setting up the loss" are altogether unqualified, and do not limit the Court to order the defendant not to set up the loss "at the trial"—or "in the pleadings"—but generally, and without any reserve; and therefore extend, in my opinion, to restrain such inequitable defence from being set up, wherever, whenever, and in what manner soever such defence might be "set up" against the plaintiff's otherwise successful demand.

So also the words used by the Legislature as to the "action" are equally general and unqualified, and plainly include all "actions founded upon" a *lost* negotiable instrument; and are not limited to those actions in which, as special pleaders say, the "cause of action" is complete before the lost instrument is presented. No one can contend that in the class of cases like the present the plaintiff's action, whether complete or not before presentation, is not *founded upon* the lost instrument; and therefore in this respect also the present plaintiff is within the protection of this section.

Moreover, I am not aware of any precedent or authority for interpreting, still less for limiting, the intention of the Legislature, in any enactment quite general in its terms, by reference to any technical rules of our Courts; more especially when these rules are only rules of special pleading or mere practice—regulations which can never be held to control any general words of the Legislative authority. On the contrary, I am of opinion that the Legislative authority must always assume that the judiciary will in all cases, from time to time, carry out the general words of the Legislature; *i.e.*, in the present

1886.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

1866.
 The
 AUSTRALIAN
 JOINT STOCK
 BANK
 v.
 The
 ORIENTAL
 BANK.

case, that the judicature will prevent all defendants from setting up the loss of such notes as the present, or any other negotiable instruments, by issuing all such collateral or additional or extended orders as may be necessary, according to the rules of justice rather than of special pleading, so as to give general and effectual protection to the losers of all negotiable instruments within the protection of this section.

There is also another point of view of this section from which its proper construction may be ascertained, viz.—by assuming all bank notes to be drawn (as they might be) according to the present form, viz., payable on demand at a particular place. Would this Court then be prepared to hold, in effect, that the loss of the bank notes could not come within the benefit of this statute, because the allegations of not presenting such notes could be successfully set up in the declarations? I do not think that upon such an assumption as I have made, any Court of Justice would be found to sacrifice this statutory provision, in this sweeping manner, to the merest technicality of special pleading; and I cannot see that in construing a statute, we, the Judges, can give any different decision merely because other bank notes are admitted to be within the section, as not being limited to payment at a particular place.

Or again, to consider the loss of these notes from another point of view, is it not absurd and most unjust to contend that the Oriental Bank, after receiving the cash for these notes, can on the note being lost, retain such cash in their own coffers, and decline the indemnity provided by this Act; while as to all other bank notes, the Bank must repay the cash, on the holder giving the proper indemnity? I confess that a very large amount of faith in the importance and value of the technical rules of special pleading, as against the words and equity of this statute, will be required before such a result can be acquiesced in by me.

I may also call attention to this circumstance, that no argument is attempted that the Legislature *could not* do that which it seems to me the words have done.

It was further argued by the defendants, and with great confidence, that in such a case as this Equity would not interfere under its usual jurisdiction as to lost instruments, and that, therefore, the Common Law Courts ought not. I do not, however, see the slightest ground for doubting such equitable interference; but on the contrary, I think that, both upon principle and authority, an injunction would be as readily granted upon such bank notes being payable "at a particular place" as upon any other bank notes or negotiable instruments.

The jurisdiction of Equity in such matters as in the case of lost deeds, bonds, and other instruments, was originally founded upon the inadequacy of the Common Law jurisdiction to give suitable relief for the purposes of justice and good conscience, by reason of the various technical forms of law requiring production of deeds, or bonds; see *Walmsley v. Child* (a), *Ex parte Greenway* (b), and *East India Company v. Boddam* (c). And the modern jurisdiction of Equity as to lost bills and other negotiable instruments was founded upon this: that the Common Law Courts were unable (until the Common Law Procedure Act) to insist upon a perfect or proper indemnity suitable to the circumstances of each case; see *2 Campbell* (d), and *Hansard v. Robinson* (e).

It is also perfectly clear that in the exercise of this equitable jurisdiction the Court adapts its relief to the circumstances of each particular case; and it seems to me that, inasmuch as in the present case the inability to present the notes at the place mentioned, arises from and is directly consequential upon the loss of the notes, a Court of Equity would have no hesitation whatever in making the usual equitable decree in such case, extending the order to restraining the defendant from setting up the non-presentation of the lost note, no less than from setting up the loss of the note; see Lord *Hardwicke's* observations in *Walmsley v. Child* (f). Moreover, it seems to me, upon reviewing all the authorities, that as the Common Law Courts have in modern times altered

1866.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

(a) 1 Ves. S. 341.
(d) 211.

(b) 6 Ves. 812.
(e) 7 B. & C. 90.

(c) 9 Ves. 466.
(f) 1 Ves. 345.

1866.
 The
 AUSTRALIAN
 JOINT STOCK
 BANK
 v.
 The
 ORIENTAL
 BANK.

their practice as to profert of deeds and bonds (a), so as to meet the requirements of justice and equity as to such lost deeds and bonds, those Courts should be equally ready to modify their practice, if necessary, as to lost notes and other negotiable instruments; and that under their present statutory jurisdiction, as well as by analogy to the equity jurisdiction upon which this section is founded, the Common Law Courts ought to order that the loss of the bank notes in question shall not be set up against the plaintiff either by want of non-presentation or otherwise, so as to meet the justice of the present case.

Nor do I consider the case without express equity authority in this respect; for I find that in *Macartney v. Graham* (b) in 1828, the lost bill was accepted, "payable at the banking-house of *Burnard, Durnsdale and Co.*, London;" but the usual equitable relief appears to have been given without any hesitation as to such presentment being considered necessary to justify the equitable jurisdiction. In fact, the case of *Hansard v. Robinson* (c) having then recently (in 1827) decided that presentment was necessary at law, the Equity Court decided that the jurisdiction of equity was thereby called into exercise.

So also in the Irish case, *Macdonald v. Murray* (d), the present point was apparent on the face of the bank note, not as a mere memorandum, but precisely as on the present bank notes in the promise itself. Yet the statutory jurisdiction appears to have been exercised after elaborate arguments at the bar, and without any suggestions on the present point by the very eminent Judges of that Court.

The remarks of Lord *Tenterden* (our greatest authority upon all points of mercantile law) in *Hansard v. Robinson* (e), seem to me to be strictly applicable to the present case. After admitting that by "the custom of merchants" (which is quite as great an objection as the specialty of the promise in the present case), the holder of a lost bill payable at a certain place must lose his

(a) See 5 Ves. 238; 6 Ves. 812, 813, and Supplement, 163 & 164; and *Read v. Brookman*, 3 T.R. 151.

(b) 2 Sim. 285.

(d) 9 Ir. C. L. R. 502.

(c) 7 B. & C. 90.

(e) 7 B. & C. 95-6.

action, because he cannot present such bill at the place named, Lord *Tenterden* continues thus:—"Is the holder of such bill then without remedy? Not wholly so. He may tender a sufficient indemnity to the acceptor; and, if it be refused, he may enforce payment thereupon in a Court of Equity. And this is agreeable to the mercantile law of other countries. In the modern Code de Commerce of France (a) this is distinctly provided for. And this provision is not new in the law of that country, but is found also in the Ordonnance de Commerce of Louis the Fourteenth (b)."

1866.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

It seems to me, therefore, to follow inevitably both upon the just construction of the statute—upon principle—and upon the authorities so far as they exist, that the Common Law Courts ought not to allow the loss of negotiable instruments to be set up as a defence either by alleging want of presentation, which must be assumed to be impossible, or in any other mode whatever that a defendant attempts to set up such loss, when he has no other defence and when a proper indemnity can be given.

Lastly—It seems to me that this Court has already to some extent, in *Hoppe v. Single* (c), decided the present point, by holding that a defendant shall not demur to a declaration which omits to state the presentment of a lost cheque, when a Judge has already granted an order under this section to prevent setting up the loss of the cheque. Both members of this Court, however, in that case, appear to have stated their opinion to be, that the order under this section ought not to have been made in that case, because "until presentment the plaintiff had no cause of action." Nevertheless the defendant does not appear to have acted upon such suggestions, and therefore upon the whole report of *Hoppe v. Single* there does not appear to be a formal and conclusive decision either for or against the present application.

To sum up the arguments in this case, independently of *Hoppe v. Single*, I am of opinion—

Firstly. That the words of the statute include bank notes payable on demand at a particular place, cheques,

(a) Sec. I., Tit. 9, Art. 1511, 52. (b) Tit. 5, Art. 19.
(c) 2 Sup. Ct. R., C.L. 88.

1866.
 The
 AUSTRALIAN
 JOINT STOCK
 — BANK
 v.
 The
 ORIENTAL
 BANK.

and all other negotiable instruments of the present class; and that there is nothing to exclude such instruments from the protection of this section, either in the words of the Legislature, or in any argument, reason, or principle, applicable to this particular class of negotiable instruments.

Secondly. Because all negotiable instruments of this class existed at the time of the enactment, and must therefore be held to have been in the mind of the Legislature, and therefore included in the general words of the section under consideration.

Thirdly. Because the judicial authority must adapt all its technical rules to follow legislative enactments—not to restrain them; to carry out the intentions of the Legislature, and even to extend the statute, if necessary, to all cases within its mischief and remedy; if within a reasonable construction of the words of the statute.

And *Fourthly.* Because the equitable jurisdiction would, both upon principle, and, so far as authority exists, upon authority also, disregard all such technical distinctions as the defendants have attempted to set up in the present case, so as to exclude lost negotiable instruments of this class from the equitable protection of an indemnity; and that the Common Law Courts were intended, under this section, to follow the equitable jurisdiction.

For these reasons, I think that the plaintiffs are entitled to the order asked for; and that it should be drawn up in the words of the statute or otherwise, so as fully to exclude the defendants from setting up the loss of these notes in any part of this action.

FAUCETT, J. This is an application made by the plaintiffs under the 53rd section of the Common Law Procedure Act of 1857 (corresponding to the 87th section of the English Act), to restrain the defendants from setting up as a defence the loss of a large number of bank notes, upon which the action has been brought upon receiving from the plaintiffs such indemnity as the Court may require.

The notes in question are in the ordinary form of bank notes payable to bearer on demand, and differing only from such notes—if it be a difference—in the circumstance that they are made payable at the office of the defendants in Sydney.

Payment of the notes has been demanded by the plaintiffs at the place mentioned, and an indemnity at the same time offered, but refused by the defendants on the ground that at the time the demand was made the notes were not presented.

This application is now opposed, chiefly on the same ground; and it is contended that the section in question has no application in such a case as the present.

It is said that no right of action can arise upon a note payable to bearer on demand at a particular place, unless a demand has been made, and the note presented at the same time, at the particular place—that such is the contract on the part of the maker; and that the holder, or the person lawfully entitled to be the holder, cannot be relieved from this express stipulation of the contract, either at law or in equity. The contention, therefore, on the part of the defendants comes to this; that unless everything has been done, and every condition precedent performed by the holder before he has lost the notes, that would be necessary to entitle him to maintain an action—in other words, that unless he has actually presented the note for payment at the particular place named, and payment has been refused, and in short, unless his cause of action is complete before the loss—he cannot take advantage of the statute; for otherwise it is said that the Court would be supplying for a plaintiff an element which did not exist, but which was necessary to constitute his cause of action—would in fact be giving him a cause of action where none existed.

Now, if this contention be right, it is quite clear that, if the holder of a note payable to bearer on demand at a particular place should have the misfortune to lose the note before he has presented it for payment, he would be entirely without redress, and would have no possible means of recovering the amount, whether it be £1 or £1000, which the note represented.

1866.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

1866.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

It is admitted that, if the notes in the present case had been presented for payment at the office of the defendants, and payment had been refused, and the notes had been afterwards lost, the section now under consideration would apply, as such notes are negotiable instruments within the meaning of the section.

In order to ascertain whether this contention on the part of the defendants is well founded or not, it is necessary to consider, first, how the law stands in such cases; and secondly, to what extent Equity—so far as can be collected from general principles and the decided cases—would assist a plaintiff.

First as to the law. It is clear from a number of authorities from the earliest to the latest period, that no action can be maintained at law upon a lost note, if the defendant chooses to avail himself of that defence. Whatever doubt, if any, may have before existed, this is now clearly established by the case of *Hansard v Robinson* (a). Under the old form of pleading, the defendant might have availed himself of this defence under the general issue, but now he must set it up in a special plea. In either case, however, it was formerly, and is still immaterial, whether the loss occurred before or after the note had arrived at maturity; the defence was equally good in both cases, and the plea now alleges the loss in general terms, without stating whether before or after maturity. Allowing this defence in the case of a note, which has been lost after it has been duly presented for payment, and payment has been refused, would certainly appear to be contrary to a well-known principle of law, that a right of action once accrued can be got rid of only by satisfaction or a release; but it seems to be founded entirely on mercantile usage, which requires that on payment the instrument should be given up to the payor for his security against any subsequent claimants.

It is also clear that no action can be maintained at law upon a note payable at a particular place, unless the note has been duly presented for payment at the particular

(a) 7 B. & C. 90.

place. Nothing, except perhaps the destruction of the note, will dispense with this obligation.

The defendants then have a double defence to this action; first, on the ground that, independently of the mercantile usage, no cause of action ever existed, as the plaintiffs never presented the notes at the office for payment; and secondly, on the ground that, according to the law founded on the mercantile usage, no action can be maintained because the notes are lost. The plaintiffs, therefore, unless they can be assisted by the 53rd section of the Common Law Procedure Act, will consequently be defeated in this action.

But it is said that this section was merely intended to give to Courts of Common Law the same powers and jurisdiction which had been before exercised by Courts of Equity. Assuming that this is so, it becomes necessary to consider the cases in equity.

The first case then that has been cited is *Walmsley v. Child (a)*. In this case *W.* lodged money with the defendants, for which he took notes payable to himself or bearer—goldsmiths' notes. *W.* lost the notes, and having informed the defendants of the loss, they offered to pay the amount on getting an indemnity. The indemnity was not given, and *W.* died. Seven years elapsed, and then the suit was brought by his executrix. Relief was refused. In the first place the Lord Chancellor seemed to think that the loss was not sufficiently proved. Secondly, it does not appear that an indemnity was offered by the bill; but the plaintiff appears to have rested her case on the loss, and the lapse of time, as proving the loss. But thirdly, the judgment was founded on the ground that the plaintiff ought to have brought her action at law. The Lord Chancellor says, "If the plaintiff can prove the loss she may declare on the notes; but to get rid of the proof she may bring her *indebitatus assumpsit* for money had and received." And following up this reasoning, he gives the reason for the distinction made by Courts of Equity between a lost bond and a lost note, viz., that in an action on a bond profit is

(a) 1 Ves. 341.

1866.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

1866.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

necessary, which is not necessary on a note. For a reason unnecessary to consider, the Statute of Limitations was held not to apply. Now this ground, and also the reasons given in support of it—whatever may have been the state of the law in Lord *Hardwicke's* time—are clearly inconsistent with modern decisions. An action may be maintained on a *destroyed* note—probably even though the destruction took place before maturity or presentation—and, the destruction being proved, secondary evidence of the contents will be allowed. In such a case the defendant can run no risk of being called upon to pay a second time. But on a lost note, as we have seen, no action can be maintained; and this arises, not from the inadmissibility of the evidence, or the technical rule of pleading—a rule shortly afterwards done away with—but from mercantile usage and the law founded upon it, which prevents the action from being sustained because the instrument cannot be given up on payment. And further, *indebitatus assumpsit* for money had and received would not now lie, while the security, although lost, was outstanding.

The next case is that of *Glyn v. The Bank of England* (a), also before Lord *Hardwicke*. The bill was founded on the loss of bank notes, and prayed a decree for payment, offering an indemnity. Relief was refused; first, because the proof of the loss was not sufficient; but secondly and chiefly because the Lord Chancellor considered, as in the former case, that the plaintiff ought to have brought his action at law; as upon proving the loss he might give evidence of the instruments.

Now in both these cases it is clear the notes never were presented for payment; and it is equally clear that the Lord Chancellor was of opinion that, if the loss were proved, the plaintiff ought to recover. But if the law had been then settled, as it is now clearly established—that an action at law could not be maintained—I think we may reasonably, and indeed must of necessity, infer that if the loss had been proved Lord *Hardwicke* would have given relief in equity. He says, in the first case,

“ The defendant admits that *prima facie* the legal right to recover this money appears to be in the plaintiff ; and his objection from the import of the contract, being payable to bearer, and no want of assignment, &c., is carrying it too far in any case ; for undoubtedly one’s having lost his note or security is no reason why he should lose his debt.” Again he says, “ The contract of the party is that it should be paid to the bearer of the note ; it is a promise on the part of the drawer of the note to pay the person named or bearer.”

1866.
The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

Notwithstanding this form of contract, Lord *Hardwicke* considered that the plaintiff ought to recover—he thought at law—but according to the modern decisions he could not recover at law ; it follows, therefore, that he ought to get relief in equity. Besides one of the three cases mentioned in the judgment, in which a person may seek relief in equity on the foundation of a lost instrument, is when he prays satisfaction and payment of it upon terms of giving an indemnity. And the case of *Terrese v. Geray* is mentioned, in which relief appears to have been given on a bill of exchange, which from the report would seem to have been lost before presentation.

In *Ex parte Greenway* (a), the bill of exchange was lost after being protested ; and proof was allowed in Bankruptcy on an indemnity being given. This case cannot assist, as everything had been done before the loss, which was necessary to constitute a cause of action, and consequently comes within the class of cases to which the learned counsel for the defendants admits that the section is applicable.

The *East India Company v. Boddam* (b) was the case of a lost bond ; and the Lord Chancellor, having referred to the necessity of proof, which had at this time been done away with, gives another reason for the exclusive jurisdiction of the Courts of Equity—namely, “ that indemnity was not so familiar at law ; and they did not know how to manage it.” “ It is,” he adds, “ now very familiar at law ; but great difficulty arises

(a) 6 Ves. 811.

(b) 9 Ves. 464.

1866.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

upon it," in consequence of Statute 9 and 10 W. III., c. 17, s. 3.

In *Mossop v. Eadon* (a), half a note being lost, the plaintiff sought relief, offering an indemnity. But relief was refused, the Lord Chancellor holding, on the authority of the previous cases, that an action could be maintained at law.

In *Davies v. Dodd* (b) in 1817, the bill prayed that payment might be decreed against the acceptor of a lost bill of exchange on an indemnity being given, and relief was granted. But it does not appear from the report whether the bill was lost before or after maturity. But if it be the same bill on which the action was brought in 4 Taunt. 602, it was lost before maturity.

In *Macartney v. Graham* (c) in 1828, a bill of exchange payable at the banking house of *Barnard and Co.*, and specially endorsed, was lost—having been stolen from the mail—before maturity. The bill offered indemnity. The Court held on demurrer that the last endorsee could maintain his suit against the acceptor without making the prior indorsees parties. The V. C. said that the case of *Mossop v. Eadon* had been overruled by the decision in *Hansard v. Robinson* (d).

And in *Cockell v. Bridgeman* (e) in 1841, the bill of exchange had been presented for payment and dishonoured, and afterwards lost. Payment was prayed, and an indemnity offered; but relief was refused on the ground that the loss was not proved—not on the ground that an action ought to have been brought at law.

In *Wright v. Lord Maidstone* (f), the bill of exchange on which the suit was founded was the last of a series of bills that had been destroyed after dishonour. Demurrer to the bill was allowed with leave to amend. The V. C., in referring to the decision in *Hansard v. Robinson*, says, "The real effect of that decision is to cut away the principle on which relief was refused in such cases."

(a) 16 Ves. 430.

(c) 2 Sim. 285.

(e) 4 Beav. 499.

(b) 4 Price 176.

(d) 7 B. & C. 90.

(f) 1 K. & J. 701; 24 C. J. Ch. 63.

In *Cook v. Darwin* (a), the Master of the Rolls says :—" The Court certainly has jurisdiction in the case of a lost instrument, both when profert is required at law, and also when an indemnity is required to be given to the defendant that he may not be sued by some other person whomay have possession of the instrument."

Now, I think it appears clearly from all these cases that all the Judges considered that, if the loss of notes or bills of exchange were proved, the loser was entitled to recover the amount. In the early period the Judges considered that he ought to recover at law, and consequently refused relief in Equity. In the later period it has been decided that he could not recover at law ; and the Courts of Equity, finding that by such decision the ground on which relief was formerly refused has been cut away, have accordingly granted relief ; and in one case, at all events—*Macartney v. Graham*, already cited—where the loss occurred before maturity, and the bill was payable at a particular place, have admitted on demurrer their right and power to do so.

But it is said that these cases are of no authority, as in none of them does it appear that the instrument was payable at a particular place, and, accordingly, required to be presented at that place before a right of action could accrue ; and that no case has been or can be cited in which a Court of Equity has given relief founded on the loss of such an instrument, where the loss has occurred before presentation. *Macartney v. Graham* is, however, one instance, at all events, to the contrary.

The case of *McDonnell v. Murray* (b) has been cited, in which an application similar to that now made was granted, the action being founded, as in the present case, upon bank notes payable at a particular place. It might be sufficient to rest my judgment on that case, which was very fully argued and carefully considered. But, it is said, the point now taken was not then taken ; and I think it was not. That circumstance may be an argument in favour of the plaintiffs. But, however this may be, the case is an authority for holding that bank notes,

1866.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

(a) 23 L. J. Ch. 997.

(b) 9 Ir. C. L. R. 495.

1866.
 The
 AUSTRALIAN
 JOINT STOCK
 BANK
 v.
 The
 ORIENTAL
 BANK.

in the ordinary form, are within the meaning of the section in question.

But after all, what is a bank note? Is it not, like an ordinary promissory note, a security for a debt—an acknowledgment of a debt or liability, with a promise to pay on demand, either generally or at a particular place? By its own import, as well as by the law merchant, it is negotiable; and the *bona fide* holder becomes a creditor for the amount it represents, and it is a continuing security in his hands. The same law has attached to it a condition that on payment it shall be handed over to the payor. But whether payable generally, or at a particular place, and in the latter case requiring to be presented at that place, does the loss, which renders presentation and delivery over impossible, cancel the debt or liability either at law or in equity? Does the loss do anything more than suspend the power of recovering at law a debt that still exists? To repeat the language of Lord *Hardwicke*, in *Walmsley v. Child*, “the objection from the import of the contract, being payable to bearer, and no want of assignment,”—and, I may add, being payable at a particular place—“is carrying it too far in any case; for undoubtedly one’s having lost his note or security is no reason why he should lose his debt.” This language was used to show that the loser ought to recover at law; but now that he cannot recover at law, how much more forcibly does it apply to prove that he ought to recover in equity.

As the debt or liability therefore remains, and as the security only is lost, I am of opinion that the particular form of the notes in this case does not exclude them from that class of cases in which equity gives relief on the ground of a lost instrument, on the terms of giving an indemnity, whether the instrument had been lost before or after maturity. To hold otherwise would, in my opinion, be giving to the words of the statute, a restricted meaning which the Legislature never intended. Besides, I think this comes, to a certain extent, within the principle of those cases in which, according to Lord *Redesdale*, relief will be given in equity where an action

cannot be maintained at law in consequence of some condition precedent not having been performed by the plaintiff; *Davis v. Hone* (a).

I ought to mention that the case of *Hoppe v. Single* (b) can scarcely be considered an authority; as the Chief Justice does not give his reasons for the opinion he has expressed; and Mr. Justice *Wise* seems to have founded his opinion chiefly on the circumstance that the half cheque in the plaintiff's possession had not been presented; and, besides, it was not then necessary to decide the point.

I am further of opinion that, taking all the circumstances of this case into consideration, it is one in which the discretionary power of the Court ought to be exercised. There is every probability that the notes will never make their appearance, and that the defendants consequently will in reality incur no risk. On the whole, therefore, I am of opinion that the application ought to be granted. But the declaration which rests the cause of action on presentment, which it avers, ought to be amended.

STEPHEN, C. J. The order of the Court is, that the loss of the several bank notes declared on in this action, or any of them, shall not be set up by the defendants; the plaintiffs within ten days from this date giving security, to the satisfaction of the Prothonotary, to indemnify the defendants against the claims of any other persons or person upon such notes (c).

(a) 2 Sch. & L. 347-8

(b) 2 Sup. Ct. R., C. L. 88.

(c) In *Hargan v. Kennedy*, 25th September, 1865, *Burton* on behalf of the plaintiff applied in Chambers to *Hargrave, J.*, for an order under the 53rd section of the Common Law Procedure Act of 1857, to restrain the defendant from setting up as a defence the loss of a cheque upon which the plaintiff was suing, upon the plaintiff giving to the defendant an indemnity, to the satisfaction of the Prothonotary, against the claims of any other person upon the cheque. The cheque sued upon was one for £37 8s., dated 5th January, 1864, drawn by the defendant in favour of the plaintiff; and having been stolen from the plaintiff, it had not been presented. The defendant had stopped payment at the bank. It appeared that before the action was commenced the defendant refused to pay more than £30, claiming to deduct certain expenses incurred by him in attending the trial of a person charged with stealing the cheque.

Iceton, for the defendant, showed cause, and contended that the 53rd section of the Common Law Procedure Act did not apply. The cheque

1866.

The
AUSTRALIAN
JOINT STOCK
BANK
v.
The
ORIENTAL
BANK.

1866.

HARGAN
v.
KENNEDY.

not having been dishonoured, the plaintiff had no cause of action on the instrument. The Legislature did not intend to give a cause of action where none existed, but only upon certain terms to do away with the defence arising under the plea of a loss of a negotiable instrument. He relied on *Hoppe v. Single*. *

Burton in reply. In that case the defendant had not any opportunity of paying before action brought. The statute ought not to be limited to cases in which the plea of loss of the instrument would be a defence.

HARGRAVE, J., made the order, and directed the plaintiff to bear his own costs of the application, and of the indemnity.

Ex parte HAWKINS (a).

July 5.

A complaint under the 9 G. IV., c. 31, s. 27, for an assault, was as follows:—
“—personally cometh before T. B. C., Esq., one of Her Majesty's Justices of the Peace, &c. and upon his oath complaineth that J. T. and J. C.” did assault “the said H. H., contrary, &c.” The complaint was signed by H. H., but there was not the name of any justice subscribed to the *jurat*.

On the day of the hearing before the justices H. H. did not appear personally, but his attorney appeared, and stated that he appeared for the complainant, for the purpose of informing the justices that the matter had been abandoned, and withdrawn by notice; and J. T. and J. C. having pleaded not guilty, at their request the justices dismissed the complaint, as not having been proved. *Held*, that there was no complaint by the party aggrieved, as required by 9 G. IV., c. 30, s. 27; and that the justices had no jurisdiction to adjudicate.

A writ of *certiorari* had issued on June 11, directing certain justices to return an order made by them dismissing an information for an assault, with the original information and all subsequent proceedings.

It appeared that on the 28th March *Hawkins* had instructed his attorney to withdraw a complaint he had instituted against one *John Taylor* and one *James Stacey*, for an assault, and to commence proceedings in the District Court against *John Taylor* only, and that he had delivered a notice to that effect to the Clerk of Petty Sessions, and that he posted notices to that effect to *John Taylor* and *James Stacey*. But on the return day of the summons, when the complaint was called, the attorney for *Hawkins* informed the justices that “the matter had been duly abandoned and withdrawn by notice, as before mentioned, some nine days before.” It appeared, however, that *John Taylor* and *James Stacey*, although they admitted the receipt of the notice, contended by their attorney that the justices were bound to dismiss the complaint on the ground of the non-appearance of *Hawkins*; and that after argument the justices accordingly dismissed it, and granted a certificate of such dismissal.

* 2 Sup. Ct. R., C. L. 88.

(a) Before *Stephen*, C. J., *Cheeke*, J., and *Faucett*, J.

The following is a copy of the material parts of the proceedings, as they appeared on the return to the writ. The complaint was as follow :—

1866.

Ex parte
HAWKINS.

Complaint under 9 Geo. IV., c. 31, for an assault and battery.

New South Wales, Deniliquin, to wit.—Be it remembered that on the 27th March, 1866, at Deniliquin, in the Colony of New South Wales,—personally cometh before me, *T. B. Carne*, Esq., one of Her Majesty's Justices of the Peace for the said colony, and upon his oath complaineth and informeth me that *John Taylor* and *James Clacey* of Deniliquin, of the said colony, did, on the 24th March, 1866, at about midnight, in Earl-street, &c., unlawfully assault and beat the said *Henry Hawkins*, contrary, &c. ; and thereupon the said *Henry Hawkins* prays &c.

Sworn before me, at the Police Office, }
Deniliquin, the 27th March, 1861. } *Henry Hawkins.*

The notice was as follows :—

To the Clerk of Petty Sessions, Deniliquin.

<i>Henry Hawkins</i> v. <i>John Taylor.</i> <i>Henry Hawkins</i> v. <i>James Stacey.</i>	}	I am directed by Mr. <i>Henry Hawkins</i> to notify to you that he does not intend to proceed in the Police Court, Deniliquin, upon the summonses taken out herein. Dated this 28th March, 1866.
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George A. Jeffrey,

Attorney of the said *Henry Hawkins*.

The adjudication was as follows :—

Be it remembered that on the 27th March, 1866, complaint was made before *T. B. Carne*, Esq., one of Her Majesty's Justices, &c., for that *John Taylor* and *James Stacey* (therein erroneously named *James Clacey*), of Deniliquin, &c., did, on the 24th March, 1866, at &c., unlawfully assault and beat one *Henry Hawkins*, contrary to the statute, &c., and thereupon the said *Henry Hawkins* prayed that he the said justice would proceed in the premises according to law ; and the said *T. B. Carne* thereupon issued summonses under his hand and seal, directed to the said *John Taylor* and *James Stacey* (therein named *James Clacey*), commanding them in Her Majesty's name to be and appear on Friday, the 6th April, then next, at the hour, &c., at &c., before such justices, &c., to answer to the said complaint, and to be further dealt with according to law ; and now at this day, to wit, on the 6th April, 1866, at &c., the said *John Taylor* and *James Stacey* appeareth before us, two of Her Majesty's Justices of the Peace, in Petty Sessions assembled, at the Police Office, Deniliquin, in order that we should hear and determine the said complaint ; but the said *Henry Hawkins* although duly called doth not personally appear, but his attorney *G. A. Jeffrey* appeareth, and states to us that he appeared for the complainant, for the purpose of informing us that the matter had been abandoned and withdrawn by notice ; and the said *John Taylor* and *James Stacey* having pleaded not guilty to the said complaint, we, at the request and on the claim of the said *John Taylor* and *James Stacey*, did dismiss the said complaint—the same not having been proved.

Given, &c.

Eras. Wren, J. P. (L. S.)

Alex. Landale, J. P. (L. S.)

1866.

Ex parte
HAWKINS.

Stephen now moved to quash the order. It is admitted that the justices according to the decisions had power to adjudicate, although the prosecutor did not appear; *Bradshaw v. Vaughton* (a), *Tunnickliffe v. Tedd* (b). But it is contended that the prosecutor had his election to invoke either a summary remedy or a proceeding contemplating an indictment, or in this colony an information by the Attorney-General; *R v. Deny* (c). In that case, an information made before the magistrate stated that the informant having been assaulted and beaten by another person, prayed that he might be bound over to keep the peace towards him. On the magistrates (before whom the case was heard) proceeding to deal with the merits of the question of the assault, the informant protested against their adjudicating upon it; and it was held that they had no jurisdiction to convict summarily the offending party of the assault against the will of the informant. "He may proceed," says *Erle, J.*, "by indictment or by action; or he may apply for a summary conviction before two justices under the statute. But the magistrates have no jurisdiction to convict summarily, and impose a fine for the assault, when it is an established fact that the complainant before them does not intend to give the magistrates jurisdiction to deal with the assault." [*Stephen, C. J.* Here, however, the prosecutor expressly states that he proceeds under the 9 G. IV., c. 31, and therefore summarily.] It is also submitted that the justices had no jurisdiction, as the information appears to be by no person whatever named; and one of the defendants there named is *Clasey*, whereas the justices gave their certificate to *James Stacey*. How could the justices certify that *James Stacey*, in whose favour they made an order of dismissal, is the same person as the *James Clasey* against whom the complaint was made? For no evidence was taken.

Butler for the justices. The complaint need not be in writing; it is enough that it really appears to be the complaint of the informant; *R. v. Inhabitants of Bed-*

(a) 9 C. B. N. S. 115; 30 L. J. C. P. 93.

(b) 5 C. B. 553; 17 L. J. M. C. 67.

(c) 2 L. M. & P. 230; 20 L. J. M. C. 189.

ingham (a). There is abundant evidence of a complaint, and the informality of the document does not deprive the magistrates of jurisdiction. But at all events the plaintiff appeared by attorney, and therefore the jurisdiction of the justices attached. *Ex parte Hopwood (b)* shows that *certiorari* only lies if the justices have no jurisdiction over the subject matter. In that case the parties had received an unreasonable short notice of the charge; and the conviction took place without proof of service of the summons, and without any evidence of the facts charged. He referred to *R. v. Preston (c)*.

1866.

Ex parte
HAWKINS.

Stephen in reply. What was there before the justices for them to dismiss? They had nothing except the one document, and that does not amount to or show any complaint. [*Stephen*, C. J. Moreover, the order recites that a complaint was made on such a day, before *T. B. Curne*, a justice, that the defendants had assaulted one *John Hawkins*; so that it may be inferred that the complaint was not by *Hawkins*, whereas the statute 9 G. IV., c. 31, requires the complaint to be by the person aggrieved.]

STEPHEN, C. J. I am of opinion that the conviction must be quashed, and therefore the certificate of the adjudicating magistrates will go for nothing. Under the 9 G. IV., c. 31, two justices have jurisdiction, "upon complaint of the party aggrieved, to hear and determine such offence." By the 29th section of the 11 and 12 Vic., c. 43, in all cases of summary proceedings upon any information or complaint, "it shall be lawful for one justice to receive such information or complaint." The statute does not require the complaint to be in writing; and the rule of law is, that unless a statute expressly so requires it, the complaint need not be in writing (*d*). A verbal complaint is enough. But here the complainant went before one justice and produced a written document, which is now before us. That document, in my opinion, is not a complaint; it is signed by the prose-

(a) 5 Q. B. 653. (b) 15 Q. B. 121. (c) 12 Q. B. 826.
(d) See *Millard's Case*, Dears. 167; 22 L. J. M. C. 108.

1866.

Ex parte
HAWKINS.

cutor, but not by the justice ; and it states that——complaineth, &c., that certain persons did “ assault and beat the said *Henry Hawkins*.” If *Hawkins* had appeared at the hearing before the justices to prosecute the complaint, all these defects might, in my opinion, have been cured, because the law would assume that he was the complainant. And it does not seem to me that, under the circumstances, as they appear on the proceedings, *Hawkins* appeared by attorney, or that there is any admission that he appeared. The justices then announce that they have jurisdiction, and that having power to proceed they will dismiss the complaint. It is clear that, if they had jurisdiction to dismiss the complaint, they also had the power, and it was their duty, to grant a certificate of such dismissal. But in my opinion they had no jurisdiction. No person was before them making a verbal complaint ; and the justices only had notice of this document. If this is not a complaint by the party aggrieved, the justices had nothing to dismiss. This is not a complaint by *Hawkins* as the party aggrieved ; neither does it appear to have been made to a justice of the peace ; for it is not signed by any justice. The foundation, therefore, of the jurisdiction of the adjudicating justices was wanting. I have no doubt, as a matter of fact, that there was a complaint ; but, in my opinion, there was no evidence before the justices, except this document, and that was no evidence of a complaint.

CHEEKE, J. The justices, in my opinion, had no jurisdiction, because there was no valid complaint upon which they could adjudicate.

FAUCETT, J. I concur. For some time I doubted whether the defects in the complaint had not been cured by what occurred on the return day of the summons, when the attorney stated that he appeared for *Hawkins*, “ to inform them that the matter had been duly abandoned.” But I am now of opinion that it is safer to treat this document, which purports to be the complaint, as only evidence of the alleged complaint before the justices. The absence of the name in the former part of the com-

plaint, might perhaps have been cured by the words, "and thereupon the said *Henry Hawkins* prays that the justice" will proceed in the premises. But on looking at the document, the signature of *Hawkins* at the foot would rather tend to make it appear that he was the person before whom this complaint had been laid. There is nothing also to show that the complaint was made, as is required by the statute by the party aggrieved. The very basis of the jurisdiction seems, therefore, to be wanting. The order is also defective. It states merely that a complaint was made (not saying by whom); and it continues, for that "*James Stacey*, therein erroneously named *James Clasey*," &c. But how can the justices know this? They therefore assert in the order a fact of which they had no evidence. It would have been otherwise, if one of the defendants had appeared and stated that he appeared in answer to the summons, and that his name was *Stacey*.

1866.

Ex parte
HAWKINS.

Conviction quashed, with costs against
Stacey and Taylor.

1866.

ICKERSON *against* HAYES.

In an action by the indorsee of a promissory note against the maker, the first plea alleged that the note was made and given to S., in payment of the price of certain ale and stout, under an agreement by S. to sell to the defendant twenty hogsheads of "Muir's new brew" ale, and three hogsheads of stout, both guaranteed to be in good condition; that S. did not deliver any such ale or stout, but wholly neglected in any respect to perform his agreement; and that the note was indorsed to the plaintiff after maturity. The second plea varied from the first, only in the allegation that the indorsement by S. to the plaintiff was without value. At the trial the allegations of the pleas were proved; it appearing that the ale delivered after the promissory note was given was unsound, and not of the stated description, whereupon the defendant wrote to S., offering to send it to any place S. might name. The jury having found for the defendant on the first issue, the Court (*Hargrave J., dissentiente*) refused to disturb their finding: because the note having been indorsed after maturity, the plaintiff stood in the shoes of S., his indorser, between whom and the defendant the absence of consideration or its failure was fatal to the instrument.

The plaintiff at the trial having given no evidence of value, *Held* (*Hargrave, J., dissentiente*), that the circumstances raised such a degree of suspicion of fraud, affecting him and his title, as to render it incumbent in him to give that evidence, and that the defendant was entitled to the verdict on the second plea.

On motion by plaintiff for judgment *non obstante veredicto*, *Held* (*Hargrave, J., dissentiente*), that the first plea was not bad, at least after verdict, for omitting to allege that the contract was rescinded, or that an offer was made on the breach to return the articles.

Except in the case of accommodation bills or notes, he who takes a negotiable instrument after its maturity does so at his peril, and obtains by indorsement no better title or right than his immediate indorser had.

THIS was an action on a promissory note made by the defendant in favour of one *Smith*, and indorsed by *Smith* to the plaintiff.

Pleas—1. That the note in the declaration mentioned was made by the defendant, and delivered by him to one *Francis Smith*, in payment of the price of certain ale and stout, agreed to be paid by the defendant to the said *Francis Smith*, under and by virtue of a contract entered into between the said *Francis Smith* and the defendant—whereby the said *Francis Smith* agreed to sell to the defendant twenty hogsheads of *Muir's* new brew ale, guaranteed sound and in good condition, and three hogsheads of stout in good order and condition (2 *L. and C.*, and 1 *Woods*), and to deliver the same to the defendant within a reasonable time; that although a reasonable time for the delivery of the said ale and stout had at the commencement of this suit elapsed, the said *Francis Smith* did not deliver to the defendant any *Muir's* new brew ale sound and in good condition, nor any stout in good order and condition (2 *L. and C.*, and 1 *Woods*), according to his agreement, but, on the contrary, has wholly neglected and refused so to do, or in any respect to perform his said agreement; that the consideration on which the said note was made and delivered to the said *Francis Smith* as aforesaid, has wholly failed, and that,

except as aforesaid, there never was any value or consideration for the making of the said note, and that the same was overdue when it was first endorsed to the plaintiffs.

1866.

ICKERSON
v.
HAYES.

The second plea varied from the first, only in the allegation that the note was endorsed to the plaintiff, and that he has always held the same without any value or consideration. Issue thereon.

At the trial before *Faucett, J.*, in the February sittings, it appeared that the promissory note was given, as alleged in the pleas, in payment of the price of certain ale and stout, under a contract, whereby *Smith* agreed to sell to the defendant twenty hogsheads of *Muir's* new brew ale, guaranteed to be in good condition, and three hogsheads of stout similarly warranted. It appeared that on receipt of the twenty hogsheads, or within five days afterwards (the note in question having been given three days previously), the defendant took samples from three of the casks and found them sour. On the sixth day he informed *Smith* of this, and gave notice of a survey, which was in fact held on the second day following. Only ten of the casks were then examined, but all of these were found to be bad, and not of the stated description. Five days afterwards, receiving no communication from *Smith*, the defendant by letter rescinded the contract, and offered to send the goods to any place which might be named. As to the stout, which was said to be rotten, one cask was *Wood's*, the others *L.* and *C.*

The jury having found for the defendant on the issues raised by the pleas,

Salamons, for the plaintiff, now obtained a rule for judgment *non obstante veredicto*, or for a new trial, on the grounds—first, that failure of consideration was no defence to this action; second, that the pleas were not proved—as there was no total, but only a partial failure of consideration; thirdly, that on the second plea there was no evidence, or no sufficient evidence of a want of consideration given by the defendant.

March 6.

Stephen, for the defendant, showed cause. The contract was made on the 31st of May. The ale was de-

June 14.

1866.

ICKERSON

v.

HAYES.

livered on the first of June; on the 8th, the defendant notified to *Smith* that he rejected it; and on the 16th, he by letter offered to return it. Ten casks were tasted; and not one of these casks was *Muir's* new brew. No portion of the ale answered to the sample; at all events, the bulk did not, and therefore the purchaser was entitled to return it all. There was a total failure of consideration. It was not necessary actually to send the article back. It is sufficient to express a willingness or intention to reject it. It is clear that the defendant never sold a drop of it, or exercised any dominion over it. But there was an absolute repudiation of the article. It is clear that there is no delivery until the purchaser has done something more than examine it. "It is to be observed," says Lord *Tenterden*, delivering the judgment of the Court in *Street v. Blay (a)*, "that, although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial." In an action by the indorsee against the drawer of a bill of exchange, the defendant pleaded that the bill was given in payment of the price of seventeen pockets of hops, sold by the plaintiff to the defendant as hops of a certain grower, and answering certain samples. It appeared that seventeen pockets of hops, but not according to the sample, had been delivered, and remained in the defendant's possession at the time of the trial; the jury having found for the defendant on the special plea, the plaintiff moved to enter the verdict. *Parke, B.*, in giving judgment says, "The plea states that the bill was drawn, and indorsed in payment of the price of certain hops, sold by the plaintiff to the defendant, as and for

(a) 2 B. & Ad. 463.

hops of a certain planter, and which were to answer certain samples; and then it alleges that the plaintiff had not delivered any hops answering the said samples; that would be a good plea, and would show a total failure of the consideration, which is to deliver hops answering to the samples within a reasonable time. If such inferior hops were accepted, that would be quite a different case, and would create a new contract." In such a case the learned Baron says it would be necessary in the replication to aver the acceptance of such other hops; *Wells v. Hopkins* (a). It is clear that there was here a total failure of consideration, followed by an offer to return it. In such a case the vendee is only bound to tell the vendor that the article is not according to the sample, and offer to return it; *Lucy v. Mouflet* (b). In this case such an offer made by letter by the defendant, and unacknowledged by the plaintiff, was considered sufficient evidence of acquiescence by the plaintiff, even although it appeared that more had been consumed by the defendant than was necessary for the mere purpose of examination. *Trickey v. Larne* (c) and *Warwick v. Nairne* (d), cited in *Bullen and Leake* (e), which show that, where a bill is given for the price of goods sold with a warranty, a breach of warranty is no defence to an action on the bill, are inapplicable, as here there was a total failure of consideration. The next question is whether the facts disclose a defence against a holder for value, but who had taken a promissory note after its maturity. The equities of a note affect it; and this is an equity. It is only in cases of accommodation notes that the absence of consideration is not an equity attached to a note indorsed after maturity; *Charles v. Marsden* (f), *Sturtevant v. Forde* (g), *Stein v. Yglesias* (h), *Lazarus v. Cowie* (i), *Jewell v. Parr* (k), as cited in *Byles* (l). The reason of this doctrine is, that in cases of accommodation there is no prejudice to the

1866.

 ICKERSON
v.
HAYES.

(a) 5 M. & W. 7.

(o) 6 M. & W. 278.

(e) p. 451.

(g) 4 M. & G. 104.

(i) 3 Q. B. 459.

(k) 16 C. B. 684.

(b) 29 L. J. Ex. 112.

(d) 10 Exch. 764.

(f) 1 Taunt. 224.

(h) 1 C. M. & R. 565.

(l) 143.

1866.
 ICKERSON
 v.
 HAYES.

acceptor, unless there was an agreement for the purpose of restraining the negotiation of the instrument after it became due. Surely a total failure of consideration will be tantamount to an equity, defeating the operation of a bill. *Sharp v. Arbuthnot (a)* is a distinct authority that a Court of Equity would restrain an action on the bill under such circumstances. In that case *S.* directed *A. and Co.* to send him cotton from Bombay, and draw on him a bill for the amount. The bill was drawn and accepted by *S.* When the cotton arrived *S.* refused to receive it, as being of inferior quality to that ordered, and the cotton therefore remained in the hands of *A. and Co.'s* correspondents. The Lord Chancellor held that under such circumstances *S.* was entitled to be protected against the payment of the bill.

With regard to the question under the next plea, whether this is a defence against one who holds without value, it is submitted that there was ample on the evidence for the defendant to call on the plaintiff to prove the value given, and he showed none. The mere fact that the defendant is not called as a witness, if there is no other evidence to affect him, is not sufficient to sustain a verdict against him; but if there is any evidence against him, as for instance an implied admission on his part, the circumstance that he is not called to explain it has been considered sufficient to turn the scale and sustain the verdict against him; *McKewen v. Cotching (b)*.

Salamons contra. This is not a case of want of consideration, but of a failure of consideration; but the latter is no defence except between the original parties. It is laid down in *Chitty (c)*, that "it is an established doctrine that a partial failure of consideration will constitute no defence, to an action on a bill or note, if the *quantum* to be deducted on that account be unliquidated, and not in the nature of a certain debt." It is clear that the question of failure of consideration might not arise for several months; and that if enquiries of this kind after so long a time could be allowed in an action on a bill of

(a) 13 Jur. 160, 219.

(b) 27 L. J. Ex. 111.
 (c) On Bills 49.

note, the negotiability of these instruments would be much impeded. If there be a contract for, that is, twenty casks of ale of a stipulated description, and one is delivered not according to the description, it is admitted that the purchaser may return the whole twenty, provided that no promissory note or bill of exchange has been given. But if a promissory note or bill of exchange has been given, the purchaser will have no defence to an action on those instruments. *Wells v. Hopkins* (a) supports this view. *Sturtevant v. Ford* (b), *Lazarus v. Cowie* (c), *Carruthers v. West* (d), *Sully v. Frean* (e), and *Warwick v. Nairn* (f) were referred to.

As to the second plea there was no evidence whatever that there was no value or consideration given by the plaintiff, and it was not for him to show the fact affirmatively. In *Fitch v. Jones* (g), the question being when it lies upon the plaintiff to show that there was consideration for the indorsement, and when upon the defendant to show that there was none, Lord Campbell says, "It is clear that, when there is illegality or fraud shown in a previous holder, a presumption that there is no consideration for the indorsements does arise; for the person who is guilty of illegality or fraud, and knows that he cannot sue himself, is likely to hand over the instrument to some other person to sue for him. It is not properly that the burden of proof as to there being consideration is shifted; but that the defendant, on whom the burden of proof that there was no consideration lies, has, by proving fraud or illegality in the former holder, raised a *prima facie* presumption that the plaintiff is agent for the holder, and has, therefore, unless that presumption be rebutted, proved that there was no consideration. But no such presumption arises where there was in the former holder a mere want of consideration, without any illegality or fraud." The Court will see that there was evidence enough to go to the jury; *Crafter v. The Metropolitan Railway Co.* (h). The evidence

1866.

ICKERSON
v.
HAYES.

(a) 5 M. & W. 7.
(c) 3 Q. B. 459.
(e) 10 Exch. 535.
(g) 5 E. & B. 238.

(b) 4 M. & G. 101.
(d) 11 Q. B. 143.
(f) 10 Exch. 764.
(h) 35 L. J. C. P. 132.

1866.
ICKERSON
v.
HAYES.

shows no sufficient return of the goods. It is contended that the plaintiff is entitled to judgment *non obstante veredicto*. [Stephen, C. J. Only ten of the casks were examined, but every one which was examined was neither sound nor according to description.]

Cur. adv. vult.

August 2.

Judgment was now delivered by their Honors, as follows :—

STEPHEN, C. J. I have fully considered this case, separately and in conference, and am of opinion that the verdict was right, and ought not to be disturbed; certainly as to the first plea, which alleges that the promissory note was indorsed after maturity, and (although with less confidence) as to the second plea also, which alleges that it was indorsed without value.

The note in question was made by the defendant, payable three months after date to one *Smith* or order; and was indorsed by him to the plaintiff, beyond all doubt, after maturity—and, as there was ample ground for suspecting, without value. But, as to the latter fact, the evidence was incomplete. The plaintiff gave no evidence of value; but it is not clear on whom (in a case of this kind) the burthen of proof lies. The defendant's pleas, as already indicated, vary only with respect to the allegation of indorsement. Both alike state, that the note sued on was made and given to *Smith*, in payment of the price of certain ale and stout, under a contract, whereby he agreed to sell the defendant twenty hogsheads of *Muir's* new brew ale, guaranteed to be in good condition, and three hogsheads of stout, similarly warranted—but that the vendor did not deliver any such ale or stout, and has wholly neglected in any respect to perform his agreement.

Now, the evidence proved conclusively all these allegations. On receipt of the twenty hogsheads, or within five days afterwards (his note having been given to *Smith* three days previous), the defendant took samples from three of the casks, and found them to be sour. On the sixth day he apprised *Smith* of this, and gave notice of a

survey; which was, in fact, held on the second day following. Only ten of the casks were then examined, but all of these were found to be bad, and not of the stated description. Five days afterwards, receiving no communication from *Smith*, the defendant by letter rescinded the contract, and offered to send the goods to any place which might be named.

It is clear, therefore, that, supposing no bill or note to have been given for the price, *Smith* could not have recovered from this defendant one farthing. As to the stout, there was only a breach of warranty; but the ale was not merely unsound:—it was not the thing contracted for. In either case, however, the defendant was entitled to return the liquors; or, without actual re-delivery, to reject them—giving due notice, as he did, of such rejection. I say, in either case; for this was no purchase of specific or selected articles; and the contract which was executory, was single and entire; *Street v. Blay* (a), *Lucy v. Mouflet* (b). The jury would, indeed, have been justified in finding the whole transaction a fraud; vitiating the contract from its inception.

But, if the contract was void for fraud, or liable on the other grounds to rescission, it is equally clear that, under the circumstances stated, *Smith* could not recover on the promissory note. A mere breach of warranty, doubtless, (in the case of a specific selected article, at all events), or other partial failure of consideration, must be the subject of a cross action; *Warwick v. Nairn* (c). But the absence or total failure of consideration is, and always has been, as between the original parties to a note or bill, a complete defence to an action on it; *Wells v. Hopkins* (d), *Abbott v. Hendricks* (e).

This proposition, so far as it respects an entire absence of consideration, is not disputed. But the distinction was relied on, between that case and the failure of consideration simply. The distinction is valueless; for the rule as to the sufficiency of the defence, whether it be a total absence or total failure of consideration, is the same.

(a) 2 B. & Ad. 463.

(b) 29 L. J. Exch. 112.

(c) 10 Exch. 764. (d) 5 M. & W. 8. (e) 1 M. & G. 794.

1866.

ICKERSON
V.
HAYES.

1866.

IOKERSON

v.

HAYES.

See the text, and cases cited, in Mr. Justice *Byles's* treatise (a). The distinction, in truth, is more often merely technical. If, for example, the note here was in consideration of *Smith's promise* to deliver the goods, that consideration has (it may be said) only failed; whereas if, as alleged in the pleas, the note was given by anticipation as the *price* of those goods, and in payment for them, then there never was any consideration for it at any time.

The plaintiff contends, however, that his title as an indorsee without notice, and for value (both of which facts must, for the purposes of the first plea, be assumed)—notwithstanding his acquisition of title since the dishonor of the note—is unimpeachable. I confess myself to be astonished, that, at this time of day, a question on such a point should be raised. It has always been thought by me to be settled law, that he who takes a negotiable instrument after its maturity does so at his peril; that (in the language of Lord *Ellenborough*) it then comes disgraced to him; and that, so taking the instrument, he obtains by indorsement no better title or right than his immediate indorser had. He will have the same title, for he is considered as standing in his shoes; but—unlike the case of a transfer during the currency of a note or bill—he will possess no better title. This rule, long established, has been unfortunately encumbered with the phrase, in the statement of it by some learned Judges, that the instrument is subject to all the equities which in the hands of the transferor attached to it. But it will be seen from the cases, that the term “equities” is scarcely accurate; and that the rule is, in effect, as here expressed. And I find no authority (certainly not in *Carruthers v. West*, although cited on the point), for the suggestion by Mr. Justice *Byles*, in his note to page 143, that want of consideration is not an infirmity attaching to a bill or note within the rule.

The case of *Sharp v. Arbuthnot* (b) is an authority the other way. There, the defendant at law had accepted a bill for the price of some cotton, on its passage from

(a) 7th ed., pp. 109, 110. (b) 13 Jur. 160; and on Appeal, p. 219.

India, in the expectation that it would answer the description ordered. Finding that it did not, he repudiated the purchase and demanded possession of his acceptance; but, in the meantime, it had been transferred (apparently for value) to a third party. On suit in equity thereupon instituted by him, charging knowledge of the facts in the holder, the latter was restrained from proceeding in his action. The decision was, no doubt, on the injunction merely; but it is sufficient for my present purpose. For, except in the case of an accommodation bill, knowledge of the infirmity of the indorser's title,—and, in all cases, the absence of value for the indorsement—stands on the same footing as the taking of the instrument when overdue; see *Whistler v. Forster*, per *Willes*, J. (a). It is clear, however this may be, that the only “equity” in that case (between the original parties) was, as here, the want of consideration for the purchaser's acceptance. But, if that infirmity in the payee's title had not attached to the bill itself, it never could have been objected to the title of his indorsee.

A review of the authorities will, I conceive, abundantly establish this rule. The earliest reported is *Brown v. Davis* (b); an action by the indorsee of a promissory note, against the maker. It appeared, that it had in fact been paid, but that the holder afterwards (and after maturity) fraudulently indorsed it for value to the plaintiff, who was ignorant of the fraud. The Court held, that nevertheless he was not entitled to recover. Mr. Justice *Buller* said that, generally, when a bill or note is due, the person receiving takes it on the credit of him who gives the instrument; and that, on that ground, the maker of a note might in such cases set up any defence against the holder, which he had against the payee. “If a bill be not due,” he observed, “it carries no suspicion on the face of it, and the party receives it on its own intrinsic credit. But, if overdue, it is out of the common course of dealing, and gives rise to suspicion.” In *Boehm v. Sterling* (c) that doctrine was recognised; Lord *Kenyon* (who had doubted in the previous case)

1866.

 LOCKERSON
v.
HAYES.

(a) 32 L. J. C. P. 164. (b) 3 T. R. 82. (c) 7 T. R. 429.

1866.
ICKERSON
v.
HAYES.

saying, that a person taking a bill after maturity does so subject to all the equity, which the party from whom he takes it is liable to. In *Tinson v. Francis (a)*, which was the case of an accommodation note, indorsed after maturity, Lord *Ellenborough* ruled the same way; observing that after a bill or note is due, it comes disgraced to the indorsee—who, if he takes it, “though he gives a full consideration for it, takes it on the credit of the indorser, and subject to all the equities with which it may be encumbered.”

This last case, no doubt, as to the particular instance of accommodation bills and notes, is no longer law. But the general rule, with respect to every other class of negotiable instruments, has never been impeached. Lord *Campbell*, in a note to *Tinson v. Francis*, refers to the two previous cases as having established that rule; of which he approves, as one tending to repress fraud in bill transactions. In *Crossley v. Ham (b)*—an action by an indorsee against the drawer and indorser of a bill—the rule was held to apply, where the indorsement was after the drawee’s refusal to accept, merely. Lord *Ellenborough* says—“The plaintiff took this bill, after its dishonour by the drawees. He took it, therefore, with all the existing infirmities belonging to it.” The defence accordingly was sustained, that, by agreement between the defendant and the then holder, payment of a certain other bill should be received as payment of the present; such other bill having been paid. That agreement, it was held, bound the bill sued on; Lord *Ellenborough* further observing as follows—“A note overdue is still negotiable, but the party receiving it takes it subject to the equities, which attached to it in the hands of the former owner.”

This doctrine, I repeat, has never been impugned by any decision, except in the case of accommodation bills or notes. This exception, if it be one, was introduced by *Charles v. Marsden (c)*. The stated reason for the distinction is, that such instruments are given by the accommodating party, for the express purpose of enabling his

(a) 1 Camp. 19.

(b) 13 East 503.

(c) 1 Taunt. 225.

friend to raise money; and that, unless there was an agreement not to negotiate after maturity, the former might naturally contemplate, and could not be prejudiced by, such negotiation. This very excepted case, however, proves the existence of the general rule. Thus, in *Lazarus v. Cowie* (a), Lord Denman citing *Charles v. Marsden*, says—"According to that case, the indorsee (after a bill or note is due) stands in the shoes of the indorser, in other cases; but not in that of accommodation bills." Again, in *Parr v. Jewell* (b), per Pollock, C. B., "The fact of a bill being overdue calls for inquiry on the part of him who takes it."—"In fact it is a disgraced bill: any body may take it, but he takes only the right which the holder had." See also *Holmes v. Kidd* (c), *Burrough v. Moss* (d), and other cases. In *Oulds v. Harrison* (e) Baron Parke states the rule thus—"The indorsee of an overdue bill takes it, subject to all the equities that attach to the bill in the hands of the holder when it was due."

The stated exception from this general rule, it seems to me, has not been cordially recognised in subsequent cases; although it must now be taken as established. *Stein v. Yglesias* (f) is scarcely a decision upholding it; for, in any event, the pleadings there were defective, and the defendant had leave to amend. In *Sturtevant v. Ford* (g) the exception was certainly adopted; but *Tindal*, C. J., and *Cresswell*, J., distinctly intimate, that they do so only because of their being bound by previous decisions.

The case of *Carruthers v. West* (h), like *Stein v. Yglesias*, is not a decision on the point. It was an action by the indorsee, against the accommodation acceptor of a bill, payable to one *Sewell*, and by him indorsed to *Barclay*, who (according to the declaration) indorsed to the plaintiff. The last indorsement, by whomsoever made, was after the maturity of the bill; and the plea alleged that fact, and that the defendant accepted the instrument on an express condition—with *Sewell* and *Barclay*,

1866.

ICKERSON
V.
HAYES.

(a) 3 Q. B. 464.

(c) 28 L. J. Exch. 112.

(e) 10 Exch. 578.

(g) 4 M. & G. 104.

(b) 16 C. B. 709, 710.

(d) 10 B. & C. 558.

(f) 1 C. M. & R. 566.

(h) 11 Q. B. 145.

1866.

ICKERSON

V.

HAYES.

apparently—that it should be negotiated before maturity, and not afterwards. The Court held the plea bad, for not alleging that *Barclay* or *Sewell* indorsed the bill after maturity; observing that it was possible, consistently with the plea, that both had indorsed pending the currency of the bill, and that the plaintiff derived his title from a subsequent and innocent indorser. Whatever may be the authority of that case, it assuredly is none for the position relied on; that the original absence of consideration is not an infirmity, which affects an overdue note or bill—even with notice of such infirmity. The case touches the question, only (and that indirectly and inconclusively), of the want of original consideration in accommodation bills and notes; but nothing more.

There is no decision in any of these cases, that the infirmity arising from absence of consideration does not attach itself—for it is *necessarily* attached—to the instrument. The decision is, simply, that such a want (in the particular instance) is not an infirmity defeating the instrument. And for this reason—that the parties always contemplated the absence of consideration, and meant the bill or note to operate, notwithstanding. Why should it not equally operate, therefore, after maturity? For the general rule, as we have seen, only amounts to this; that the party taking an overdue bill or note, not taking it in the usual course, acquires no better title than that of his indorser. But, although such indorser may be the friend accommodated (and so, a person who has given no value for the instrument), the Courts hold that, unless restrained by express stipulation, he possesses the same right to indorse after maturity, that he had before. In other words, there is no infirmity or equity in such cases, between the original parties, prejudicial to negotiation at any time. For the very object of the instrument, as between them, is one necessarily irrespective of consideration or value.

The case of accommodation bills and notes, therefore, strictly speaking, is not an exception from the general rule, but an illustration of it. For, neither want of consideration nor indorsement after maturity being an ob-

jection, there is nothing to affect the indorser's title. Consequently, in those cases, the indorsee has an equally good one.

1866.

 JOKERSON
 v.
 HAYES.

But, applying the general rule here, the plaintiff clearly cannot recover, for he stands in the shoes of *Smith*, his indorser—between whom and this defendant the absence of consideration, or its failure, is fatal to the instrument. And, unless prepared to overrule the authorities cited, we must hold that such an absence or failure has equally that effect in this action. For otherwise the plaintiff, although taking this note after its dishonour, will not stand in *Smith's* place, or be affected by his equities; but will acquire a title, while his indorser had none at all. We need not consider, therefore, any question of mere terms; as to this absence or failure being an equity, attaching or not attaching to the instrument. But it is impossible to conceive how, if an agreement to abstain from negotiating a bill be an equity so attaching, the utter absence of consideration—equally with a total failure of consideration, the very foundation of its existence—is not *a fortiori* such an equity.

As to the second plea, I am also of opinion with the defendant. The plaintiff, it is admitted, offered no evidence of value given by him; and the question is whether the circumstances disclosed at the trial raised such a degree of suspicion, affecting him and his title, as to render it incumbent on him to give that evidence. I think that they did. The rule of law, as laid down in *Fitch v. Jones* (a), I take to be this; that, whenever a reasonable presumption arises, in an action on a bill or note—from the nature of the case or otherwise—that the plaintiff is merely the agent of the previous holder, whose title to sue on the instrument is impeached, the plaintiff must prove that he gave value for it. Fraud, or illegality in the consideration, it is held, furnishes such a presumption. But mere absence of consideration for the making of the instrument (or, I apprehend, the failure of its consideration), will not be sufficient.

(a) 5 El. & B. 244.

1866.

ICKERSON
v.
HAYES.

Now, in this case, there were matters highly indicative of fraud in *Smith*, connected with the sale, and of complicity between him and the plaintiff, in respect of the entire transaction. The liquors delivered were in all probability, on the evidence, doctored or (so to speak) vamped up by the latter for delivery; and the note given for the price, discounted at a bank by *Smith* shortly after the delivery, was indorsed to the plaintiff on its dishonour. These circumstances, taken together, were in my judgment amply sufficient to overcome the ordinary presumption—though I do not know that this arises, in favour of one who acquires the instrument after maturity—that the owner of a bill or note has given value for it. Consequently, on the plaintiff's failure to prove that fact, the defendant was entitled to the verdict on his second plea.

Other points, however, yet remain. The plaintiff's motion, although eventually for a new trial, is primarily for judgment in his favour—notwithstanding the verdict. He insists that the pleas are bad, in any event, for not alleging two things: first, that the contract was rescinded, or at least that an offer was made, on discovery of the breach, to return the articles; and, secondly, that the breach (assuming it as between the original parties to be fatal) occurred during the currency of the bill, or at any rate before its indorsement to the plaintiff. For, it was urged, if the contract was not broken until after such indorsement, *Smith* had a transmissible title to the instrument, when he indorsed; which title, once vesting in his indorsee, cannot be defeated by any subsequent matter, of which the latter could know nothing.

As to the first of these omissions, I am of opinion that no such allegation was necessary in the pleas; or, at least, that they are sufficient after verdict. For, although the particular fact is not stated, as perhaps it ought to have been, that *Smith* omitted to deliver any ale of the description contracted for (and so the pleas might be taken to indicate a mere breach of warranty as to quality, were there no other allegation therein), they contain the general averment that he *in no respect per-*

formed his contract. But, if so, it is no partial failure or breach that is complained of, but a statement that the maker never received any consideration whatever for his note; in which case, as between the original parties, the defence is complete. There is nothing in either plea, to show that *Smith* delivered any liquor at all. The allegation as to non-delivery might mean, certainly, that none was delivered of the kind, or of the quality contracted for; but it may also mean (taken especially in connexion with the subsequent averment), that none whatever was delivered. And, after verdict, the pleas are to be supported if possible.

1866.
ICKERSON
V.
HAYES.

Asto the second omission—which applies conclusively to the first plea—a very important question arises; namely, whether the indorsement of a note or bill, for value, after maturity, but at a time when the consideration between the original parties has not failed, and therefore when the holder himself could effectually sue on the instrument, can be invalidated by any matter subsequently arising.

Now, on the face of these pleas, it does not appear when the ale and stout were to be delivered; and the breach complained of may have been, for anything that is stated to the contrary, after maturity of the note—and after its indorsement to the plaintiff. The argument in his favour is therefore a strong one, that on that supposition he is entitled to succeed. For, admitting that he was put on inquiry, the plaintiff could not then have ascertained that the agreed consideration would eventually fail, or the contract between the parties be broken. On the other hand, if an indorsee after maturity stands *precisely* in his indorser's place, and is affected by all the equities or liabilities attaching to the latter, the omitted allegation is immaterial. In that case, the indorsed instrument in its new holder's hands is of no more avail, than if still remaining with his predecessor. The indorsee takes all risks on himself; and (as the law is expressly stated to be in more than one of the decisions), whatever defence to the action could be maintained against his indorser, will alike prevail against himself.

1866.

ICKERSON
V.
HAYES.

We all agree that it is unnecessary, and therefore that it is inexpedient, to express any opinion on this novel question. For, upon the evidence, it is clear that the breach in question was shortly after the date of the note, and long before its maturity. We will therefore allow the defendant, under section 116 of our Common Law Procedure Act, to suggest on the record that such proof was given at the trial; and Mr. Justice *Faucett*, who tried the cause, is prepared to certify that it was given to his satisfaction. The defendant will then be entitled to judgment, as if the omitted matter had been originally stated in the plea.

It is not necessary to notice the other points taken for the plaintiff, in support of his motion for a new trial, because (with the exception of one, disposed of during the argument) all which were finally insisted on are substantially met by this judgment. And as to these I think it proper to say, that—although some of the propositions here laid down, and for which authority is cited, are almost elementary—they have been elaborated thus because the law appears not to be understood, and the points are not only important, but of very frequent recurrence. The suggestion also in Mr. Justice *Byles's* learned treatise, to which reference has been made, restricting as it does the operation of an important general rule, appeared to demand a more than ordinarily careful examination.

I am to add, that this judgment is concurred in by Mr. Justice *Faucett* only; Mr. Justice *Hargrave* dissenting, for the reasons about to be stated by his Honor.

HARGRAVE, J. With regard to the first plea it seems to me that the defendant, both on this plea and on the evidence, sets up *Smith's* agreement or promise to deliver twenty hogsheads of ale and porter of a certain description and quality, at a future time, within a reasonable period, as the consideration for the promissory note; and I think that such promise or agreement was a perfectly valid and good consideration for the note given at the time of such promise, which note became thereupon a

negotiable instrument, *eo instanti*, that it was delivered to *Smith*; and might from that date have been endorsed over to third parties *ad infinitum*; altogether independently of the fulfilment or nonfulfilment of *Smith's* original agreement or promise, at least until notice of such nonfulfilment.

The cases as to mutual accommodation bills which do *not* fail in their consideration by reason of either party neglecting to pay his own acceptance, as in *Rose v. Sims* (a) and other cases cited in *Byles* on Bills (b); the cases as to refusal to perform a promise to execute a lease, *Moggeridge v. Jones* (c), and numerous other cases, as to retaking possession of goods for which negotiable securities have been given by the purchaser (cited *Byles*) (d); all show that the payment of negotiable bills and notes cannot be resisted by the original acceptor or promisor on the ground of any such subsequent failure of the contract or agreement.

To enable a defendant to raise such a defence he must show fraud or some other ground which enables him to set aside the contract itself, or avoid it, *ab initio*, by showing that there was no contract at all. See Lord *Ellenborough's* observations cited in *Byles* on Bills (e). But here the defendant himself appears by the pleadings to admit, and to prove by his own evidence, that the contract (so far as not affected by his own notice to rescind, which is not mentioned in the pleas) is at the present moment a perfectly valid contract, upon which either party can sue the other; except for reasons arising from lapse of time or other circumstances dehors the contract itself.

Again, although in this case only three days elapsed between the making of the note and the delivery of the twenty hogsheads under this agreement; and although after this delivery the defendant took five days before he examined a few casks of the ale, and then took thirteen days more before he attempted to rescind the contract, it is obvious that these periods of time are quite immaterial

1866.

ICKERSON
v.
HAYES.

(a) 1 B. & Ad. 521.
(d) pp. 112, 113.

(b) p. 108.

(c) 14 East 486.
(e) pp. 112, 113.

1866.
ICKERSON
v.
HAYES.

to the points of law involved herein ; and that the decision upon this plea will affect every other promissory note and every other bill of exchange given in payment of the price of goods to be supplied at a future date ; and as to whose quality or warranty under a contract the purchaser may claim first a right of rejection at any time after the goods be delivered, as being contrary to the agreement ; and secondly, a right to rescind the contract itself, if not duly performed within a reasonable time, according to the circumstances of each particular contract.

As I understand the law as to such matters, which must certainly be of great number, of frequent occurrence, and of general importance in all our commercial and business transactions, the purchaser's usual remedy against the vendor is by cross action for breach of the contract ; and he cannot resist payment of the negotiable instrument which he gave to the vendor, except where the contract itself is avoidable *ab initio* for fraud or otherwise.

This rule also extends not to endorsees only but also to the original taker of the note. See the numerous cases cited in *Byles* (a).

The fallacy of the defendant's argument seems to me to be that he totally ignores the contract—*qua contract ab initio*—except only for the purpose of rescinding it for his own benefit ; and this, I think, the defendant cannot do on the pleadings and facts.

If I am right in the above view of the law on this matter, and also of the facts of this case, which latter were, however, not very clearly stated to the Court, it seems to me that the plaintiff, though endorsee after maturity, is entitled to the verdict upon this plea ; for it seems to me that the note was given for a promise or agreement which, except for the rescinding by the defendant himself, remains now valid, and *Smith* himself could, on the facts as I understand them, have therefore sued on the notes when he endorsed to *Ickerson*, which

(a) Chap. 10, p. 111-16.

endorsement must, as I have said, be assumed to have been *bona fide* and for value, though after maturity.

The failure to complete a contract must not be confounded with a total failure of a valid consideration *ab initio*.

In the English cases upon these points, the law and the authorities seem to have oscillated very much from *Brown v. Davies* (a) and *Tinson v. Francis* (b) to *Charles v. Marsden* (c); and from *Charles v. Marsden* to the three cases of *Sturtevant v. Forde* (d), in the Court of Common Pleas, and *Lazarus v. Cowie* (e), in the Court of Queen's Bench, and perhaps, also, *Stein v. Yglesias* (f), in the Court of Exchequer, in which three cases as well as in *Carruthers v. West* (g), the case of *Charles v. Marsden* is certainly upheld in its integrity; although as Mr. Justice Byles says (h), referring to *Parr v. Jewell* (i), the Court of Exchequer Chamber seems to have shown some inclination to reconsider the modern rule as laid down in *Charles v. Marsden*.

Nevertheless, the tendency of all the modern decisions is greatly in favour of maintaining the negotiability of these instruments; and of leaving the parties who originally issue such instruments—especially upon the consideration of future promises and contracts—to be protected, first, by their own cross action, and, secondly, by the exercise of that proper caution which all but the most imprudent do exercise as to the persons in whose behalf they create these negotiable instruments, and as to the circumstances of the promise or contract in consideration of which they hold themselves out to the world as primarily liable on the negotiable instrument. If I am obliged to elect between the two difficulties of the present case, I confess the tendency of my mind in every doubt is rather in favour of the endorsee of a negotiable instrument as against the maker.

Upon this topic I will quote the following passage from Lord Chancellor *Cottenham's* judgment in *Sharp*

1866.
ICKERSON
v.
HAYES.

(a) 3 T. R. 82.

(c) 1 Taunt. 224.

(e) 3 Q. B. 459.

(g) 11 Q. B. 143.

(h) p. 143.

(b) 1 Camp. 19.

(d) 4 M. & Gr. 101.

(f) 1 C. M. & R. 565

(i) 16 C. B. 684.

1866.

ICKERSON
v.
HAYES.

v. *Arbutnot* (a), which case, though cited by the counsel for the defendant with great confidence, is, in fact, merely an authority that equity will grant an injunction to restrain an action by an endorsee where the plaintiff alleges in his bill, and proves, by satisfactory *prima facie* evidence, that such endorsee is, in fact, the mere agent of the original drawee, and *as such* had also clear notice by letters and otherwise of all the equities of the original drawee.

Lord *Cottenham* says:—"It certainly is most important that the jurisdiction of the Equity Court," (and I would add, of this Court also), "should not be exercised under circumstances that would at all interfere with the value of these negotiable instruments, or so that it would at all restrict the facility which these instruments give to mercantile transactions; because if the jurisdiction of this Court were administered rashly, instead of the confidence which the merchant has in taking a bill, upon the faith that when it becomes due it will be paid, whatever may be the equities between the drawer and acceptor, it would interfere with the negotiable value of all instruments of this description."

With regard to the alleged total failure of consideration independently of the contract, *i.e.* as if the note had been given after the acceptance of the goods, it certainly seemed to me, upon the evidence, that at least as to the porter there was only a failure of warranty; and, consequently, only a partial failure of the consideration as a whole. Mr. *Salamon's* argument upon this point appeared to me to be conclusive against such a failure extending at most beyond the original parties.

With regard to the second plea which, after setting out the defendant's agreement with *Smith* as in the first plea, avers as follows:—"That the consideration on which the note was made and delivered to the said *Smith* as aforesaid, has wholly failed, and that (*except as aforesaid*) there never was any value or consideration for the making of the said note, and that the same was endorsed to the plaintiff, and he has always held the same without

any value or consideration,"—it will be observed that the defendant does not in this plea allege the endorsement was made after maturity; and we cannot, therefore, read this plea with the first plea, but must assume that the endorsement to the plaintiff took place before and not after maturity.

But even if the plea should be amended upon the evidence by alleging that the endorsement was in date after maturity, and after the defendant gave notice to rescind the contract, the last circumstance in the rescission of the contract certainly was not proved to have come to the knowledge of the plaintiff; and I did not gather from the evidence any other circumstances sufficient according to the authorities to throw upon the plaintiff the *onus probandi* to establish his own consideration for the note.

This is a very important point, and I have always understood the rule to be that "the defendant is not permitted to put the plaintiff to proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a *prima facie* case against him, by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, or by *fraud*, or force, or that it was lost, or that it was originally infected with illegality." See the numerous cases cited by Mr. Justice Byles (a).

Now, in this case, the evidence was altogether in favour of the original legality of the promissory note, and of course of the contract, which the defendant did not attempt to impugn as forced upon him, or in any degree fraudulent or otherwise invalid; and I cannot discover any other circumstances proved in evidence which, according to the authorities, are sufficiently "suspicious circumstances" to have compelled the plaintiff to prove his consideration for the note. Consequently upon this plea also, as it stands, I think the verdict should have been entered for the plaintiff.

As to amending either of the pleas, I think that, considering the great importance of the case, and the

1866.

ICKERSON
v.
HAYES.

(a) pp. 105-6.

1866.

ICKERSON
v.
HAYES.

different impressions which exist as to the evidence at the trial, no amendment of the pleas should take place unless the plaintiff's counsel are allowed to be heard as to such amendments,—more especially as the defendant's counsel have not suggested any wish for amendment either at the trial or during the argument on this application.

I think it right to state that it is with very great regret that I find myself unconvinced in this very difficult matter by the very elaborate summary of the authorities cited, and considered in the judgment of the Chief Justice as applicable to the present case.

FAUCETT, J. I have examined all the cases cited by the Chief Justice, and have very carefully considered the judgment he has delivered; and I entirely concur with him in the result at which he has arrived, and for the reasons he has given. I have deemed it therefore wholly unnecessary to add anything to the elaborate judgment which his Honor has pronounced.

Rule discharged.

July 3,

STOCKDALE *against* HAMILTON and another (a).

The declaration framed under the 23rd section of the Real Property Act, by a person

who had entered a *caveat*, complained that the defendants put him unjustifiably to expense, by falsely asserting title to certain land, and endeavouring to procure a certificate of title thereto, notwithstanding the fact that he was seized and entitled as they well knew. Then, after stating the lodgment of his *caveat*, and that notice of this suit had been duly given, the declaration alleged that the plaintiff had instituted it in order to establish his title, and to obtain an order restraining the Registrar General from further proceeding in the matter. *Held*, on demurrer, that the action is maintainable, and in its present form.

The defendants pleaded, first, that the plaintiff never was, nor is he now, seized in fee simple in the land in question; secondly, that he was not now in possession of the said land. *Held* good, on demurrer.

A third plea alleged that the defendants were the persons in whom the fee simple of the land was vested in possession at law or in equity, and were jointly seized of the fee simple in the land, wherefore they made application to the Registrar General and did declare that the fee simple was so vested, and that they were jointly so seized, and did carry on proceedings for bringing the land under the provisions of the Real Property Act, and to obtain a grant of a certificate of title under the act. *Held* bad, on demurrer, for not stating whether their title was legal or equitable.

A fourth plea traversing the defendants' knowledge of the plaintiff's title also *held* bad.

(a) Before Stephen, C. J., Cheeke, J., and Faucett, J.

in fee simple, and was and is lawfully and rightfully in the actual, peaceable, and exclusive possession, occupation, and enjoyment, by himself and his tenants, of certain land in this colony (to wit), 2000 acres of land at Brisbane Water; that the defendants, after the time when the "Real Property Act" came into operation, falsely claimed, pretended, alleged, and declared to the Registrar General of the said colony and otherwise, that they were the persons in whom the fee simple of the said land was vested in possession, at law or in equity, and that they were jointly seized of an estate of inheritance in fee simple, in the said land, and took proceedings and made application to the said Registrar General, and otherwise, to bring the said land under the provisions of the said act, and to obtain a certificate of title under the said act; that they were the persons in whom the fee simple of the said land was vested in possession as aforesaid, and that they were seized of an estate of inheritance in the said land, and in and by such proceedings and application falsely alleged and declared that they were seized of an estate of inheritance in fee simple, in the said land; that whilst the plaintiff was so seized of and entitled to and was in such possession and occupation of the said land as aforesaid, as the defendants well knew, they, the defendants, so as aforesaid, falsely claimed, pretended, alleged, and declared, and continued to falsely claim, pretend, allege, and declare to the said Registrar General and otherwise, that they were the persons in whom the fee simple of the said land was vested, in possession at law or in equity as aforesaid, and that they were jointly seized of an estate of inheritance in fee simple in the said land, and carried on and made and continued to carry on and make the said proceedings and application to the said Registrar General and otherwise, to bring the said land under the provisions of the said act, and to obtain such certificate of title as aforesaid under the said act, that they were the persons in whom the fee simple of the said land was vested in possession as aforesaid; and whilst the plaintiff was so seized and entitled to, and was in such possession and occupation of,

1866.

STOCKDALE
v.
HAMILTON
and another.

1866.

STOCKDALE

V.

HAMILTON
and another.

the said land as aforesaid, as the defendants well knew, caused the said Registrar General and other official persons in that behalf, to take and continue and carry on proceedings for bringing the said land under the provisions of the said act, and for granting to, and in favour of, the defendants such certificate of title in and by them to the said land as aforesaid, whereas the defendants were not and never were persons in whom the fee simple of the said land was vested in possession, or otherwise at law or in equity, and were not and never were seized of an estate of inheritance in fee simple in the said land, but on the contrary, never had, and have not, any right, title, or interest whatsoever at law or in equity, or otherwise in or to the said land, as they well knew; by means of which said wrongful acts of the defendants the plaintiff has been put to great trouble and expense in defending and protecting himself and his right, title, estate, and interest in and to the said land, and to the possession and occupation thereof, and against the said application and attempts of the defendants to bring the said land under the provisions of the said act, and to obtain such certificate of title in them to the said land as aforesaid, and has been otherwise greatly injured. Averment, that within the period of three months before the commencement of this suit, he duly entered and lodged with the said Registrar General a caveat, in pursuance of the provisions of the said act, forbidding the bringing of the said land under such provisions; and he has brought this suit to establish his title to the said land, and his said right, title, estate, and interest therein and thereto, and to obtain from this honorable Court an order and injunction restraining the defendants and the said Registrar General from bringing the said land under the provisions of the said act, as well as to recover damages from the defendants for the injury he has sustained by and in consequence of their said wrongful acts. Averment, that within three months from the receipt by the said Registrar General of the said caveat, the plaintiff in pursuance of the provisions of the said act, duly gave notice

in writing to the said Registrar General of this action, and of the nature and purpose thereof.

1866.

STOCKDALE

v.

HAMILTON
and another.

Demurrer and joinder.

Pleas (1). That the plaintiff never was, nor is he now, seized in fee simple of the land in the declaration mentioned, as is therein repeatedly alleged.

Demurrer and joinder.

(2). That the plaintiff never was nor is he now possessed of the said land as in the said declaration is repeatedly alleged.

Demurrer and joinder.

(3). That at the times, &c., the defendants were the persons in whom the fee simple of the said land was vested in possession, at law or in equity, and were jointly seized of an estate of inheritance in fee simple in the said land, wherefore they did at the said several times aforesaid take proceedings, and did make application to the said Registrar General and otherwise, and did declare to the said Registrar General and otherwise that they were the persons in whom the fee simple of the said land was vested in possession, at law or in equity, and that they were jointly seized of an estate of inheritance in fee simple in the said land, and did carry on and did make and continue to carry on and make the said proceedings and applications to the said Registrar General and otherwise, and did cause the said Registrar General and other official persons in that behalf to take, continue, and carry on proceedings for bringing the said land under the provisions of the said Real Property Act, and to obtain a grant of a certificate of title under the said Act, that they were the persons in whom the fee simple of the said land was vested in possession as aforesaid, and that they were seized of an estate of inheritance in the said land, as they lawfully might for the reasons aforesaid.

Demurrer and joinder.

(4). That at the times, &c., the defendants had not, nor had either of them, the knowledge they are by the declaration alleged to have had.

Demurrer and joinder.

1866.

STOCKDALE
v.
HAMILTON
and another.

The *Solicitor General* in support of the declaration and the demurrers to the pleas. The action is in all respects necessarily novel, for the enactment and the proceeding of the defendants under the Act are so. The twenty-third section of the Real Property Act (a) enacts, that "after the expiration of three months from the receipt of every caveat, it shall be deemed to have lapsed, unless the person by whom or on whose behalf the same was lodged shall within that time have taken proceedings in any Court of competent jurisdiction to establish his title to the estate, interest, lien or charge therein specified, and shall have given written notice thereof to the Registrar General, or shall have obtained from the Supreme Court an order or injunction restraining the Registrar General from bringing the land therein referred to under the provisions of this Act." But by no other mode could the plaintiff proceed. It is submitted that all the pleas are bad. The first and second pleas tender immaterial issues. The third plea is ambiguous; for it is doubtful whether it is intended to allege that the defendants are persons in whom the fee simple of the land was vested in possession at law, or that they were the persons in whom the same was so vested in equity. It is an immaterial averment that the defendants are jointly seized in fee; because such a seizin, unless they are also entitled to the immediate possession, which is not alleged, would not justify them in taking the proceedings complained of. The possession of the plaintiff being admitted, the plea discloses no justification. The fourth plea is clearly bad. It can be no answer to the action; for the defendants, although they have no right or title, cannot justify their taking these proceedings, because they did not know that the plaintiff was in possession, or that he was entitled.

Darley for the defendants. The words "fee simple vested in possession" do not mean that the party is in occupation. It is clear that in the case of a reversion expectant on a lease, the lessor out of possession might

(a) 26 Vic., No. 9.

be the applicant. So that the defendants here had a right to apply. The plaintiff's remedy has been misconceived. He cannot sue at law; because being in possession he cannot bring ejectment; and not having been trespassed upon he cannot sue in trespass. His remedy should be by suit in equity, to restrain the applicants from asking for a title, and the Registrar General from granting it. In this proceeding an injunction could not be asked against the Registrar General, for he is no party to the action. And the statute requires that the plaintiff should at all hazards establish his title in some proceeding suitable for that purpose. In *Milford's, J.*, judgment (a), at a former stage of these proceedings, he says—"Supposing then a person applying to have the land on which there is some other person in occupation, by an act of trespass or any other adverse title, brought within the provisions of the Act, the person so in occupation must, after lodging a caveat, apply to the Supreme Court by injunction to prevent the Registrar General from bringing the land within the Act; and thus he must establish his right to an equitable interest in the land, for he already has the possessory legal right, and cannot bring an action against the claimant who is out of possession. The person seeking to bring the land within the Act, if he should recover in ejectment, would only acquire the legal interest (and it seems that he *need* do nothing), and the equitable interest would have to be decided by means of a suit instituted by the person actually in possession. The Act says that he is to establish his right. It therefore appears to contemplate the determining the equitable right as well as the legal right in the first instance, calling upon the person actually in possession to prove his title, as he would have to do if he were about to sell his land." But this cannot be done in this action. Suppose the defendants had merely pleaded not guilty, how would the finding on that issue establish the plaintiff's title? [*Stephen, C. J.* He would establish it, if the defendants did not put him to prove it. If by pleading

1866.
STOCKDALE
V.
HAMILTON
and another.

(a) *Ex parte Hamilton*, 3 Sup. Ct. R., C. L. 316.

1866.

STOCKDALE
v.
HAMILTON
and another.

not guilty the defendants can compel the plaintiff to prove his title, you could equally do so by not pleading at all,—by letting judgment go by default.] In this action the question of title need not—in fact, cannot—be raised. It is submitted that this is an action of slander of title; and the declaration is bad, therefore, for want of the allegation of malice; *Pater v. Barker (a)*, *Pitt v. Donovan (b)*, *Addison on Torts (c)*, *Malachy v. Soper (d)*. But the only claim made by the defendants has been in due course of law; and how can an action for damages, as this is, lie for seeking, without malice, a legal remedy? Yet there can be no action at law unless the plaintiff be entitled to recover damages in it. As to the two first pleas, it is submitted that they are good. This being a proceeding wherein the plaintiff is to establish his title, the traverse of that title is material. If the plaintiff is in possession, merely in the sense of occupation, he is not entitled to bring this action. The third plea is founded upon the thirteenth section, which enacts that land may be brought under the provisions of this Act “by any person claiming to be the person in whom the fee simple is vested in possession, either at law or in equity.”

Isaacs in reply. The twenty-first section enacts that “any person having or claiming an interest in any land” so advertised, &c., may, within the time limited, &c., lodge a caveat. Actual possession is a sufficient interest under the 24th section. The plaintiff therefore need show no more. [*Stephen*, C. J. But did you not allege seizin in fee? Must you not show your title to the interest which is claimed by you?] The action is for the wrong done to the plaintiff; and, therefore, he has a right of action independent of the provision in section 23 as to proceeding for the purpose of establishing his title. And the plaintiff in such action may recover substantial damages—for instance, his costs before the Lands Title Board. There are, or have been, instances of actions, as replevin, where no damages are

(a) 3 C. B. 831.

(b) 1 M. & S. 639.

(c) p. 711.

(d) 3 B. N. C. 371.

recoverable. The second plea is bad, because it admits seizin; the first is bad, because it admits possession.

Cur. adv. vult.

1866.
STOCKDALE
v.
HAMILTON
and another.
August 10.

STEPHEN, C. J. Now delivered the judgment of the Court as follows :—

This case, or the controversy existing in it between the parties, arising under the Land Titles or Lands Transfer Act, 26 Vic., No. 9, has already been twice before the Court; and the result on those occasions will be found reported, in the third volume of the Supreme Court Reports, p. 811, and the fourth volume, p. 818. The facts, and the matters of law which these involve, are novel and peculiar; but they may be stated shortly as follows.

The defendants, claiming to have vested in them in possession, at law or in equity (but which of the two they do not state), the fee-simple of certain land, applied to the Registrar-General for a certificate of title thereto; or, in the language of the enactment, that the land might be brought under the provisions of the statute. Thereupon the plaintiff in this action, claiming an interest in the land—which interest he asserts to be that of legal and equitable owner in fee, and being actually in possession of it—lodged a caveat under section 21 of the Act, forbidding all further proceedings. But by section 23, every such caveat lapses after three months, unless the party shall within that time take proceedings in some Court of competent jurisdiction, to establish his title to the interest claimed, giving notice thereof to the Registrar General, or shall, within the like time, obtain from the Supreme Court an order or injunction, restraining that officer from bringing the land under the statute.

Hence the present action. The plaintiff complains that the defendants have put him unjustifiably to expense, by falsely asserting title to the land, and endeavouring to procure a certificate of such title, notwithstanding the fact that he was seized and entitled, as they well knew. Then, after stating the lodgment of

1866.
STOCKDALE
V.
HAMILTON
and another.

his caveat, and that notice of this suit has been duly given, the plaintiff alleges that he has instituted it in order to establish his title, and to obtain an order restraining the Registrar from further proceedings in the matter.

The plaintiff thus founds his action on the statute; and maintains, that, however unprecedented it may be, or anomalous in character, no other remedy or course is open to him. The Legislature, whether contemplating the result or not, has enabled every person claiming title to land—although not in occupation either personally or by a tenant—to seek from this new tribunal a declaration of that title, which will when issued be indefeasible. An adverse claimant, however, whether in possession or not, can only defend himself by particularising his interest, and taking proceedings in some Court to establish it. But there are no forms known to the law, by which a person having (as this plaintiff by the fact of possession presumably has) the legal title to land, or simply claiming to have such title, can sue another for impeaching that title, unless the act complained of be in its nature defamatory; and then, actual malice is essential to the right of action.

The defendants insist, therefore, that the plaintiff cannot sue them at law at all. For, in the first place, the claim made by them was duly preferred to a tribunal, having legal cognisance of it and jurisdiction over the subject matter. It could not, therefore, under any circumstances, amount to defamation of the plaintiff's title. But secondly, if it could, his declaration is bad for not alleging malice. They contend, that the plaintiff's remedy is solely in equity; where, if he really has a valid claim to the property, it could be established, and then an injunction might be obtained to protect it.

We have considered these arguments, and are of opinion that the action is maintainable—and in its present form. The 23rd section of this statute, instead of leaving the applicant for a certificate to take proceedings (either at law or in equity, as his case may require), against a party in possession, requires the latter to

initiate proceedings against the former. But the law imposes on no man an impossibility; and we must infer, therefore, that some means were supposed to exist, or were meant to be given, by which a person so circumstanced—that is to say, one in the actual occupation of land, and having or claiming title to it—could proceed in a Court of Law or Equity to establish that title. Now, assuming that the plaintiff here has or claims to have already a legal title to the land in contest (as against the defendants, at all events, and clearly the plaintiff cannot be made to show more), we cannot discover on what ground he would resort, because merely of this 23rd section, to a Court of Equity. If his title were equitable only, it certainly could not be established by an action at law; but then, the objections raised would be of an entirely different nature.

As the case now stands, with nothing before us but this record to deal with, no reason can be assigned for holding that a suit in equity could be maintained against those defendants, if an action at law cannot. What relief—beyond an injunction, which, if the plaintiff succeeds in establishing his title, will be useless—could be prayed against them? The enactment apparently contemplates an alternative mode of proceeding, for the purpose of establishing the caveator's title, or restraining investigation as to that of the applicant. It at least places an "order or injunction from the Supreme Court" in a different category, from that of a proceeding in a "Court of competent jurisdiction" to establish title. But the caveator has his option to adopt either course.

Then, if he elects that of proceeding at law, and there establishing his title, we do not see in what mode or form he can do so, other than those to which he has had recourse. The plaintiff alleges, that he is seized of and entitled to certain land in fee, but that the defendants under colour of the Land Titles Act have injuriously claimed it; wherefore, after entering a caveat against such claim, he brings this action to establish his title. No doubt, he does not impute malice, and he does claim damages—as it was necessary for him to do. But the

1866.

STOCKDALE
v.
HAMILTON
and another.

1866.

STOCKDALE

v.

HAMILTON
and another.

action is, evidently, not one founded on or arising out of damage sustained, directly or indirectly, by the plaintiff, although the false claim of the defendants is inevitably treated as a wrong done by them. And, since the action is merely for the purpose stated, no allegation either of malice or of knowledge in the defendants was necessary.

The objection, that no action lies for preferring any claim, or indeed for instituting any proceeding, in a due course of law, unless there be malice, as well as the absence of reasonable cause, is met by what has been already said. The statute makes some course of action by a caveator, claiming any adverse interest, compulsory on him. But the appropriate course, in a case like this, is at law; and the plaintiff, in taking it—while adopting (as he appears to us to have done) the nearest analogous forms—was not bound to allege more, in substance, than was necessary to disclose the nature and object of the proceeding.

We do not desire it to be understood, that we think the point quite free from difficulty; for it appears probable, that the Act was not framed originally to include cases of disputed title, where the applicant was not in possession—by himself or a tenant. The language of the schedule prescribing the form of the application (as observed on one of the former discussions), tends strongly to show this. And section 84, therefore, which specifically gives an action for damages, against any person lodging a caveat without reasonable cause, omits to confer the same right on persons who may without cause apply for a certificate of title. An applicant in possession is presumedly the owner; and he who opposes him, therefore, is reasonably required to state and establish his title. To such a state of things, the provisions of section 23 were and are fairly applicable. But section 14, as it now stands, enables persons to apply for a certificate of title, notwithstanding adverse occupancy in another; and the subsequent clause, consequently, has to be applied to a state of circumstances essentially different.

For the reasons given, judgment will be entered for

the plaintiff on the defendants' demurrer, and on his demurrer to their fourth plea. As to the latter, the question in this proceeding is, whether the plaintiff had in fact the interest which he alleged; not, whether the defendants knew it. The action, as already explained, is not for preferring a claim maliciously or without reasonable cause. It is brought for the purpose, simply and alone, of establishing the plaintiff's title to that interest; and therefore, necessarily, of inquiring whether it existed. But this inquiry, obviously, is in no degree dependent on any question as to knowledge in the defendants, one way or the other.

We think that the defendants' third plea is bad, for not stating whether their title was legal or equitable. But, inasmuch as they would equally be justified under the statute in either case, the defendants may amend; adding a plea, if they think fit, alleging the other alternative. In other words, confining their present plea (for example) to the averment of an equitable title, and alleging in the additional plea a legal one.

The first and second pleas are, in our opinion, clearly good. For this action, as we have shown, is founded on the very things—alleged by the plaintiff in his declaration, namely, possession and seizin in fee—which the defendants by those pleas seek to put in issue. If the plaintiff was really *not* in possession, his remedy (that is to say, the proper course for establishing his title) would be by ejectment—or possibly by a suit in equity, as suggested. On the other hand, although possession is evidence of title, and ordinarily of a seizin in fee, yet it does not in itself constitute title; unless, indeed, in a certain sense, and for certain purposes—as, for example, against a mere intruder or party trespassing. Therefore, the proceeding here being statutory, and to establish title, the title alleged is material and traversable.

Judgment accordingly.

1866.
STOCKDALE
v.
HAMILTON
and another.

1866.

July 4.

HIBBARD against WARDEN.

The declaration stated an agreement for a purchase of land between the plaintiff and defendant to have been as follows:—

That the defendant should pay £2000 cash down, and the remainder (the whole price being £3250) at such times as should be mutually agreed upon, not to exceed two years, with interest; and that the plaintiff should give a clear marketable title to the property. Averment, that although the plaintiff was always ready to perform the agreement, the defendant—before a reasonable time had elapsed for performance of any part of it by the plaintiff, and before any breach by him—wholly refused to perform his own portion, and then discharged the plaintiff from the performance of his part of the agreement, and from all readiness to perform it.

THE declaration stated that it was agreed by and between the plaintiff and defendant that the plaintiff should sell and convey to the defendant, and that the defendant should buy from the plaintiff, certain land known as Jilla Jibbet farm, at the price of £3250, upon the terms following—that is to say, that the defendant should pay to the plaintiff a sum of £2000 cash down, and the remainder at such times as the plaintiff and defendant should thereafter agree upon, but not to exceed two years, and to bear bank interest, and upon the terms that the plaintiff should give the defendant a clear marketable title to the said land. Averment, that though the plaintiff was always ready and willing in all respects to perform the said agreement, the defendant—before a reasonable time elapsed for the plaintiff to perform any part of the same, and before any breach thereof—wholly refused and declined to perform and fulfil his part of the said agreement, and then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of the same on his the plaintiff's part, and from being ready and willing to perform the same on his the plaintiff's part; and the defendant then wrongfully wholly broke, put an end to, and determined his said promise, whereby the plaintiff has lost the price of the said estate, and has been put to great expense in preparing to fulfil his said agreement.

Pleas (1). As to so much of the declaration as alleges that before a reasonable time elapsed for the plaintiff to

The defendant pleaded to this allegation of refusal by him (repeating the words of the declaration as to the lapse of time and the denial of any previous breach by the plaintiff), that he did not, before a reasonable time had elapsed for its performance by the plaintiff, or before any breach by him, refuse to perform his own part of the agreement. *Held* bad on demurrer.

The defendant also pleaded to the allegation of refusal (but without referring to the allegation as to time, or the denial of any breach by the plaintiff), that the plaintiff did not give or tender to the defendant a clear marketable title, and that the performance of those acts was never waived by the defendant. *Held*, on demurrer, bad.

perform any part of the said agreement, and before any breach thereof on the plaintiff's part, he the said defendant refused and declined to perform his (the defendant's) part of the said agreement; that the defendant did not, before a reasonable time elapsed for the plaintiff to perform any part of the said agreement, or before any breach thereof upon the plaintiff's part, refuse or decline to perform and fulfil his part of the said agreement.

1866.
HIBBARD
v.
WARDEN.

Demurrer and joinder.

(2). As to so much of the declaration as alleges that the defendant refused and declined to perform and fulfil his part of the said agreement, that the plaintiff did not give or tender to the defendant a clear marketable title to the said land in the declaration mentioned; and the defendant says that the giving or tendering such a title by the plaintiff on his part, was not waived by the defendant.

Demurrer and joinder.

Stephen in support of the demurrer. The first plea is equivalent to saying, "I broke my agreement after you broke yours." But it is submitted that the breach relied on is not such as entitles the defendant to get rid of the agreement altogether. Will any breach on the part of the plaintiff, however slight, justify the defendant in breaking his agreement?

Butler in support of the pleas. The first plea is merely a traverse of the breach alleged in terms, and is not open to objection; *Coulson v. Attwood* (a), *Bullen and Leake* (b). It is submitted that the question of reasonable time is in issue on this plea, because a refusal by the defendant being admitted, the only question is, whether that refusal was or was not before the lapse of the reasonable time within which the plaintiff was to perform his part of the agreement. *The London Dock Company v. Sinnott* (c) is an express authority in favor of the sufficiency of this plea. In that case the declaration stated that the defendant tendered a specification

a) 26 L. J. Ex. 244. (b) p. 375. (c) 27 L. J. Q. B. 129.

1866.
HIBBARD
v.
WARDEN.

of contract for scavenging the docks; the specification concluded with an engagement "to execute a contract on the preceding conditions within fourteen days." It averred an acceptance of the tender, and alleged as a breach that the defendant did not execute a contract, nor perform any of the matters in the tender contained; and after acceptance thereof by the Company, and without any default on the part of the Company, wholly refused to execute a contract, or to perform any of the matters therein contained. The defendant pleaded to the non-execution of the contract that the defendant did not, after the making and acceptance of the tender, and without any default on the part of the Company, refuse, as alleged; and the plea was held good. The second plea is good; for the tender of a clear marketable value is, it is contended, a condition precedent to the defendant's liability.

Stephen in reply. In *The London Dock Company v. Sinnott* the Court held the plea referred to equivalent to a denial to execute the contract, and therefore good. Here the plea admits that the defendant declined and refused, after a reasonable time had elapsed. The defendant, in fact, says, "I refused to fulfil my part of the agreement when a reasonable time had elapsed for the plaintiff to perform his part of the agreement." If the plea means to allege that the defendant did not exonerate the plaintiff, it would be good; but if it means to allege that the defendant did not put an end to the agreement before a reasonable time had elapsed for the plaintiff to perform some part of the agreement, it would be bad. The second plea is also bad; for the plaintiff does not allege a waiver of the tender of a marketable title, and the issue tendered is immaterial. The plaintiff's case is, that the defendant put an end to the agreement before the time arrived for the plaintiff to do anything.

Cur. adv. vult.

August 10.

STEPHEN, C. J., delivered judgment in this case as follows:—

This is an action by the vendor of land against the vendee, for refusing to complete his purchase. The

declaration states the agreement between the parties to have been as follows:—That the defendant should pay £2000 *cash down*, and the remainder (the whole price being £3250) at such times as should be mutually agreed upon, not to exceed two years, with interest; and that the plaintiff should give a clear marketable title to the property. Then follows an averment by the plaintiff, that, although he was himself always ready to perform that agreement, the defendant—before a reasonable time had elapsed for performance of any part of it by the plaintiff, and before any breach by him—wholly refused to perform his own portion, and then discharged the plaintiff from the performance of his part of the agreement, and from all readiness to perform it.

1866.
HIBBARD
v.
WARDEN.

The defendant pleads to this allegation of refusal by him (repeating the words of the declaration as to the lapse of time, and the denial of any previous breach by the plaintiff), that the defendant did not, before a reasonable time had elapsed for its performance by the plaintiff, or before any breach by him, refuse to perform his own part of the agreement. The defendant also pleads to the allegation of refusal (but without referring to the allegation as to time, or the denial of any breach by the plaintiff), that the plaintiff did not give, or tender to the defendant, a clear marketable title; and that the performance of those acts was never waived by the defendant.

These pleas are the second and third on the record, respectively; and they are demurred to, on the ground (substantially) that they form no answer to the plaintiff's complaint—and that the latter plea, especially, does not justify or excuse the breach of contract alleged.

We are of opinion that neither of these pleas is good, and that the plaintiff must have judgment on his demurrers to them. The contract of purchase was, as we incline to think, that the defendant should pay down £2000 immediately. But the complaint clearly is, that the contract (whatever its true construction on that point) has been wholly broken by the defendant—and consequently, that no part of that sum has been paid.

1866.

HIBBARD

v.

WARDEN.

Now, if our construction be correct, neither plea can possibly be any answer to the declaration. For, since it was his duty immediately after the contract to pay the sum mentioned, the defendant's breach in that respect was necessarily, and palpably, before any possible breach of that contract on the plaintiff's part; and before a reasonable time for the latter's performance of it, in any respect, could possibly have elapsed.

Supposing our view of the contract, however, to be mistaken, and that the defendant was only to pay this £2000 (the cash portion) on the execution of the conveyance, the case will stand thus. The plaintiff's duty then was, within a reasonable time, to prepare and deliver an abstract of his title; which, equally by law, as by the stipulation in the contract, was to be a clear marketable one. But the declaration alleges, that, before that reasonable time had elapsed, and before any other breach of the agreement by the plaintiff, the defendant refused to perform his own part of it, and discharged the plaintiff from either performing, or being ready to perform, the latter's portion. In other words, declining to go on with the purchase, the defendant released his vendor from the useless (and perhaps expensive) task, otherwise confessedly imposed on him, of preparing the abstract of title. If so, it will hardly be contended that the plaintiff was bound, nevertheless, to perform that condition.

Refusing to perform his own portion, the defendant clearly could have no further claim under the contract; and to hold that, in such a state of things, the vendor is compellable—at the election of the repudiating vendee—to go through the idle form of tendering the title, or its abstract, for rejection, would be absurd. Yet this is what the defendant insists upon, in effect, by his third plea. Not denying the refusal or discharge alleged in the declaration, he merely says that no such title was tendered or given. Of course it was not—for the reasons already stated. It is true, that the plea adds a denial of any waiver of his right on that head. But the defendant, it appears to us, should either have in terms denied the alleged refusal—or, admitting it, have justi-

fied such refusal by alleging specifically the plaintiff's previous breach, by non-performance of a condition precedent; namely, that he did not within a reasonable time make out (or prepare an abstract of) a good title.

A similar objection in substance exists to the second plea. Assuming still, as an alternative proposition, that the making out of a clear title was such a condition—that is, to be performed before any payment could be demanded—it is impossible to ascertain the meditated defence. Does the defendant mean to deny, or to admit the fact of refusal? If the latter, we repeat our opinion that he is bound to justify it—by stating specifically the grounds of such refusal.

The case of the *London Dock Company v. Sinnott* (a) was relied on in support of these pleas. But the difference between that case and the present is material. The action there was, for not executing a contract comprising certain conditions, including the execution of a bond with sureties, pursuant to an accepted tender. The plaintiffs did not, as here, excuse themselves for the non-performance of conditions precedent, by alleging a previous breach by the defendant, and concurrent discharge on his part of those conditions; but complained that, without any default on their part, he had refused to execute such contract.

This was equivalent to an allegation, under the circumstances (or it appears to have been so considered), that the plaintiffs had performed all such conditions. Be this as it may, the defendant pleaded simply—in one of several pleas—that he did not refuse without any default on the part of the plaintiffs; and no exception was taken to the form of this traverse. But there was another plea, stating that no contract was ever tendered to the defendant for execution, and that he had never waived his right to such tender. The latter raised the substantial point, therefore, whether such a tender—or at least a special request to execute, after preparation of the instrument—was or not necessary; and it was consequently scarcely worth while to raise any question, as to the

1866.

HIBBARD
v.
WARDEN.

(a) 8 El. & Bl. 347.

1866.

HIBBURN
v.
WARDEN.

sufficiency of the previous plea. No such question (as to its form, at all events), was in fact raised. The main contest arose, indeed, on an intervening plea—as to the validity of a contract like that declared on, in respect of its not having been under the corporate seal. So that, on every ground, the case is no authority to sustain either of the pleas pleaded here.

Judgment for the plaintiff.

July 6.

TUCKER and another *against* DUNCAN (a).

The Customs Act of 1865 enacts that, "on the importation of any goods now liable to duty, except tea, brandy, and gin, there shall be charged in addition to such duty twenty pounds for every hundred pounds thereof." *Held*, that the additional duty hereby imposed did not attach to goods already landed and warehoused under bond.

SPECIAL case stated for the consideration of the Court.

This is an action brought by the plaintiffs against the defendant for the recovery of £167 13s. 7d., as money received by the defendant to the use of the plaintiffs, and by the consent of the parties, and by the order of his Honor Mr. Justice *Hargrave*, dated the eighth day of December instant, according to the Common Law Procedure Act of 1853, the following case has been stated for the opinion of the Court without any pleadings.

1. On and prior to the 25th day of May, 1865, the plaintiffs had certain goods (that is to say, rum, whiskey, and wines) then bonded and warehoused in one of the Sydney bonded warehouses, under and in accordance with the Act 9 Vic., No. 15; and a bond in respect of the duty payable on the said goods had, upon entry of the same to be so warehoused as aforesaid, been duly given in accordance with the provisions of the said Act.

2. After the said date, and before the commencement of this action, the defendant, as and being the Collector of Customs for the said colony, demanded and received from the plaintiffs (in addition to the duty payable on the said goods when the same were bonded as aforesaid) divers sums, amounting to £167 13s. 7d., as and for an additional duty of twenty per centum by the defendant, alleged to have been unpaid on the said goods by the "Customs Act of 1865."

(a) Before *Stephen*, C. J., *Checke*, J., and *Faucett*, J.

3. The defendant, as such collector as aforesaid, declined to allow the said goods to be delivered to the plaintiffs, except on the payment of the said sums ; and the plaintiffs, in order to obtain the said goods, and not otherwise, paid the same to the defendant.

4. The plaintiffs contend that this additional duty of twenty per centum, imposed by the said Act, is not chargeable upon goods warehoused in bond before and at the time that the said Act came into force—such goods having been, as plaintiffs contend, imported before the passing of the Act, and the said Act not being retrospective in its operation.

5. The defendant maintains the opposite.

The question for the opinion of the Court is—whether, under the circumstances above stated, the said goods were legally liable to the additional duty of twenty per centum imposed by the said Customs Act of 1865 ?

If the Court shall be of opinion in the negative, then judgment shall be entered up for the plaintiffs for £167 13s. 7d. ; and if in the affirmative, then judgment shall be entered up for the defendant.

Darley for the plaintiffs. The question arises under the Customs Act of 1865, whether dutiable goods bonded before the time when that Act came into operation, are liable to duty under the said Act. It is submitted that they are not liable. The words of the Act are, “that on the importation of any goods now liable to duty, except tea, brandy, and gin, there shall be charged in addition to such duty twenty pounds for every hundred pounds thereof.” On importation must mean on their landing in the country from abroad, and not on their issuing from the bonded warehouse. The construction of the word was considered by Sir *William Scott* in the case of *The Adams* (a) who, in delivering judgment, says, “The breach assigned, and the only one worthy the attention of the Court, is the importation of tobacco, and to prove the importation of tobacco these facts are established. First, that it was brought to the island of Trinidad in this ship, not being British built,

1866.

TUCKER
and another
v.
DUNCAN.

(a) Edw. Ad. R. 297.

1866.

TUCKER
and another
v.
DUNCAN.

or navigated as such, but an American ship; secondly, that it was then put into a boat for the purpose of being landed and warehoused; and thirdly, that it was finally landed and warehoused. The last of these facts, that it was finally landed and warehoused, is not necessary to constitute the importation; because undoubtedly the putting into the boat with the intention of being landed, is an importation. The bringing goods in a ship is *prima facie* evidence of importation; it may be repelled, but the act of putting them into a boat from the ship, with the avowed intention of landing them, is undoubtedly all that is necessary to compose and to conclude a case of importation; and therefore, I think, I must take it that, in this case, there is sufficient proof of the fact of the importation of this tobacco." The meaning of importer and importation is also shown by the enactments 19 Vic., No. 14, s. 4, and 16 Vic., No. 7, s. 4, where the law has been assumed to be in accordance with the plaintiffs' contention. If the new duties were intended to be levied on goods in bond, the Legislature would—as in these statutes, and as in the Imperial Statute, 16 and 17 Vic., c. 107, s. 42—have so expressed itself. No tax is held to be imposed, except by the clearest words; *Dwarris (a)*. He referred to 9 Vic., No. 15, ss. 9, 11, 13, 16, 29, 61.

The *Solicitor General* for the defendant. By the clearest words, or by necessary implication, the words here used must be intended to mean when the goods are sent into the market for home consumption. Practically, importation does not take place as to goods in bond till they are taken out of bond. Until then the goods are not for consumption. In Lord *Stowell's* judgment, in the case of *The Adams*, the definition of the word importation is to be taken in reference to the circumstances of that case. Payment of duty is always suspended until the goods issue from the warehouse. If the liability to pay this duty arises when the goods are unshipped, as there is no provision as to drawbacks, the duty will be payable whether the goods are exported or not.

(a) p. 646.

STEPHEN, C. J. I think that judgment in this case must be against the Crown. All Customs' duties are "due" on importation. But, by the warehousing enactments, the actual payment may be deferred till consumption; the owner giving bond for the amount. That explains the whole matter. The statute now in question does not say that this additional duty shall be *paid*, but that it shall be "*charged*" on importation. Then steps in the provision as to warehousing (an enactment long previously passed), 9 Vic., No. 15, s. 63; which defers the time for payment. By this every "importer" may warehouse his goods "without payment on the first entry thereof." The very expression shows two things. First, that importation has taken place before such entry; for how can there be an importer where there is no importation? Secondly, that but for this warehousing clause, the payment of duty must have been contemporaneous with the first entry. The importation, which takes place by bringing goods into port with intent to land them, and thereafter doing some overt act for carrying that design into effect, became then officially complete. Importation is, at all events, perfected by actual landing. So that the additional duty imposed by the statute in question, being chargeable on importation, does not attach to goods already landed, and warehoused under bond for payment of a previously imposed less duty. If the intention of the Legislature had been, that goods so warehoused should be liable to the increased duty, that intention ought to have been expressed; as it usually is in similar statutes, and as in fact it was in the enactment passed subsequently. In my opinion, there is in this case no ambiguity; but, if any such exists, the enactments must be construed favorably for the claimant. It is a fixed and well-known principle, applying to the construction of statutes, that no pecuniary or other burthen is taken to have been imposed by them, unless there be words clearly expressing the intention to do so.

1866.

TUCKER
and another
v.
DUNCAN.

CHEEKE, J., concurred.

1866.

TUCKER
and another
v.
DUNCAN.

FAUCETT, J. I concur for substantially the same reasons. In order to create the *ex post facto* liability to taxation contended for by the defendant, the language of the enactment should be clear and unambiguous.

Judgment for the plaintiff.

July 4.

VICKERY *against* MARR (a).

In an action for nuisance, by discharging fouled water and filth over the plaintiff's land, the defendant justified, under a lost grant by S. T., the then owner of the plaintiff's land, to the then owners of the defendant's land, so to discharge. The plea, after stating the conveyance "to the said then owners of the said adjoining land, and to their heirs and assigns of the right for themselves their tenants and servants of, &c.," continued, "and by virtue of the said grant the defendant, at the times, &c., as and being tenant for life of the said adjoining land, was entitled to the right of," &c. Averment, that the grievances were user by the defendant of the said right. *Held*, on demurrer, that the plea was bad, as not stating the derivative title of the defendant from the grantee under S. T.

THE first count of the declaration stated that the plaintiff was possessed of certain land and certain houses erected thereon, and the defendant wrongfully made and constructed a certain sewer or watercourse near the plaintiff's said land and houses, and wrongfully continued the same, and into which said sewer or watercourse he (the defendant) from time to time wrongfully caused or permitted large quantities of water, sewerage matter, and filth to flow; by reason whereof divers large quantities of the said water, sewerage matter, and filth have flowed down to and upon and against the land and houses of the plaintiff, whereby the said land and houses have been and are damaged by damp, and the said houses have been rendered incommodious, uncomfortable, unhealthy, and unwholesome, and unfit for habitation.

The second count stated that the plaintiff was possessed of certain land and certain houses erected thereon, and previous to the several times of the committing of the grievances hereinafter mentioned there had been wrongfully made and constructed upon certain land near to and adjoining the said land and houses of the plaintiff a certain sewer or watercourse, and after the said wrongful making and constructing aforesaid the defendant became possessed of the said land so being near to and adjoining the land and houses of the plaintiff; and the defendant thereupon wrongfully continued the said sewer or watercourse so made and constructed as aforesaid, and

(a) Before *Stephen*, C. J., *Checke*, J., and *Faucett*, J.

into which said sewer or watercourse he (the defendant) from time to time wrongfully caused or permitted large quantities of water, sewerage matter, and filth to flow, by reason whereof divers large quantities of the said water, sewerage matter, and filth have flowed down to and upon and against the said land and houses of the plaintiff; and the defendant before the commencement of this action had notice of the premises, and the plaintiff then requested the defendant to cease causing or permitting the said water, sewerage matter, and filth to flow down to and upon and against the said land and houses of the plaintiff; but the defendant refused to comply with such request. Averment, that by reason of the premises the said land and houses of the plaintiff have been and are damaged by damp, and the said houses have been rendered incommodious, uncomfortable, unhealthy, and unwholesome, and unfit for habitation.

The third count stated that the plaintiff was possessed of certain land and houses erected thereon, and was entitled to have the use of the water of a certain watercourse which flowed through the same, and the defendant wrongfully polluted and disturbed the water of the said watercourse by throwing or causing to flow into the same large quantities of fouled water, sewerage matter, and filth, so that it became foul and noxious, and unfit for use, and by means of the premises the said land and houses of the plaintiff have been and are damaged, and the said houses have been rendered incommodious, uncomfortable, unhealthy, and unwholesome, and unfit for habitation.

The fourth count alleged that the plaintiff was possessed of certain land and of certain houses erected thereon, and that before the times of the committing of the several grievances hereinafter complained of, the defendant was possessed of certain land near to and adjoining the said land and houses of the plaintiff, and which said land of the defendant was situate at a higher level than the land of the plaintiff, and there was over and through both the land of the defendant and the land of the plaintiff a certain natural creek or watercourse, which

1866.

VICKERY

V.

MARR.

1866.

VICKERY
v.
MARR.

said creek or watercourse only flowed and contained water in tempestuous and wet weather, and in such weather carried off over and through the land of the plaintiff the rain which fell upon it, and the surface water from lands higher than the land of the plaintiff; and the defendant, well knowing the premises, from time to time wrongfully caused or permitted divers large quantities of water, sewerage matter, and filth, to be cast into the said creek or watercourse, and to flow through the said creek or watercourse from the land of the defendant into, upon, and against the said land and houses of the plaintiff, whereby the said land and houses have been and are damaged by damp, and the said houses have been rendered incommodious, uncomfortable, unhealthy, and unwholesome, and unfit for habitation.

Plea to the first count—that at the time of the said alleged grievances the defendant was tenant for life of certain land adjoining the said land of the plaintiff, upon and through which said land of the defendant, before the grant hereinafter mentioned, ran the said sewer or watercourse; and that long before the times of the said alleged grievances—by a deed made between *Samuel Terry*, the then owner of the said land now of the plaintiff, and which said owner was then seized thereof in fee, and ————— the then owners of the said adjoining land (but which deed has been lost or destroyed by accident)—the said then owner of the said land, now of the plaintiff, granted to the said then owners of the said adjoining land, and to their heirs and assigns, the right for themselves, their tenants and servants, of using the said sewer or watercourse (which theretofore had been, and thence hitherto has been, continued in and through the said land, now of the plaintiff), for the purpose of discharging and causing to flow through the same, and thereby through the land now of the plaintiff, water, sewerage matter, and filth, from the said land of the defendant; and by virtue of the said grant the defendant, at the times of the said alleged grievances respectively (as and being tenant for life of the said adjoining land) was entitled to the right of using

the said sewer or watercourse for the purpose aforesaid, and the alleged grievances respectively were user by the defendant of the said right.

1866.
VICKERY
v.
MARR

The pleas to the other counts varied only so as to meet the respective counts.

Demurrer and joinder.

Darley in support of the demurrer. The defendant being only the owner of a particular estate, ought to have shown the origin of his title. How does it appear from this plea that the defendant claimed under the grantee of *Hughes*? In *Bailey v. Stevens* (a) the sixth plea, tracing title under a lost grant, alleges that *Emery* was at the time of the alleged trespass tenant to the said *W. York*, of the said close, &c.—and as such tenant, and by virtue of the said grant, was entitled, &c. All the precedents allege (which these pleas do not) that the estate of the owners of the dominant tenement is now vested in the defendant. Suppose a forfeiture or extinguishment in the meantime! It is no defence, unless the grantees' title has come to the defendant. And the greater precision is required, as the defendant should himself know his own title. He referred to *Hendy v. Stephenson* (b), *Buller* and *Leake's* Precedents (c), *Stephen* on Pleading (d), and *Chitty* (e).

Sir *W. Manning* (*Stephen* with him) in support of the plea. The allegation is in effect contained in the pleas, for the defendant could not possibly be tenant for life (that is legally so) of the dominant tenement unless he derives title from the then owner. If forfeiture has occurred in the interval, it must be assumed that the Crown granted it to the defendant (or some one from whom he claims), together with the easement belonging to it. The allegation is sufficient; this being on general demurrer. He referred to *Stephen* on Pleading (f).

Darley in reply.

(a) 31 L. J. C. P. 226.
(c) pp. 682, 686.
(e) 3 Vol., 393.

(b) 10 East, 55.
(d) p. 247.
(f) Ch. II., § 3, s. 3.

1866.

VICKERY
v.
MARR.

STEPHEN, C. J. The pleas seem to have followed the modern forms used in England, where the Prescription Act has modified the old mode of pleading. But as that Act is not in force in this colony, these pleas are bad. The pleas ought to have shown that the defendant is tenant for life, under the last owner in fee, by distinct allegation. This seems to be necessary, equally because of the grants being only (in terms) to the owners of the fee, and their heirs or assigns; and because of the rule that a person can only prescribe as owner of the fee, or under cover of such owner, by showing title under him. And the general rule also accords that in claiming any right as owner less than of the fee, the commencement of such right should be shown.

CHEEKE, J., and FAUCETT, J., concurred.

Judgment for the plaintiff.

October 1.

WILLIAMS *against* BURLEY (a).

The indorsement of a promissory note by one to whom it has not been transferred, will not make the indorser liable on his indorsement.

APPEAL from the District Court of Maitland. The plaint contained several counts. The second of which stated that *John Hopes*, by his promissory note dated 28th June, 1865, promised to pay the plaintiff or order the sum of £35, six months after date, and the defendant indorsed the same to the plaintiff. Averment of dishonor, notice, and non-payment. The third count varied from the second, by alleging that the plaintiff delivered the note to the defendant, who then and there indorsed and delivered the same to the plaintiff, &c. The defendant traversed the endorsement as alleged in the second and third counts.

The facts appeared to be that *Hopes* was the lessee of a certain public-house, belonging to the defendant; that *Hopes* had asked the plaintiff to advance £30 to him, to enable him to pay the license for such house. The defendant had promised to be surety for the repayment of

(a) Before *Stephen*, C. J., *Hargrave*, J., and *Cheeke*, J.

this amount to any one who advanced it. The note sued on was, as alleged, made by *Hopes*, payable to the plaintiff (*Williams*) or order. The first indorsement, however, was not by *Williams*, but by the defendant. The case was tried before His Honor Mr. District Court Judge *McFarland*, who had given a verdict for the plaintiff on the second and third counts, and also on an account stated. The question was whether this finding could be sustained in point of law.

1866.

WILLIAMS
 v.
BURLEY.

The *Attorney General* for the appellant. It is submitted that under neither of these counts can the verdict be supported. At the time when the defendant's name was placed upon the instrument, the defendant had no property in the note ; it had not been indorsed, nor even it seems delivered to the defendant by the plaintiff. In fact *Hopes* had not even himself delivered the promissory note to the plaintiff at the time ; for the plaintiff who was to discount it, refused to do so without another name, and thereupon *Hopes* took the instrument away to the defendant and obtained his indorsement. It is laid down distinctly by Mr. Justice *Byles* (a), that the indorsement of a note (whether originally negotiable or not) by one to whom it has not been transposed, will not make the indorser liable on his indorsement ; *Nemo dat, quod non habet*. *Gwinnell v. Herbert* (b) is an express authority on the point. In that case the defendant was sued as maker. It appeared that the note was made by *Herbert Herbert* in favour of *William Gwinnell* or order, and it was endorsed by the defendant, *E. Herbert* ; and the Court held that the defendant was not a maker. The indorser of a note does not stand in the situation of a maker of a note, even where the indorser has endorsed a note not payable or indorsed to him, and where, therefore, his indorsee cannot sue the original maker. The distinction between the case of a bill of exchange, where every indorser is considered a new drawer, and the case of a promissory note, is obvious ; in allowing the indorser of a bill to be treated as a new drawer, the indorser's liability is not altered ; it still remains secon-

(a) p. 126.

(b) 5 A. & E. 436.

1866.
 WILLIAMS
 v.
 BURLEY.

dary or collateral only; he is only liable after presentment to the acceptor; but to suffer the indorser of a note to be charged as maker, would be at once to render the indorser's liability primary and immediate, and to place him in the situation of the acceptor of a bill.

Foster for the respondent. The decision in *Gwinnell v. Herbert* is inapplicable. The defendant in these counts is sued not as maker, but as indorser—as is suggested in the argument in that case. Every indorser of a bill is a new drawer, *Penny v. Innes* (a); and it is submitted that the same principle ought to be extended to the indorser of a promissory note. The authority of the present editor of *Story* on Promissory Notes (b) is in the appellant's favour. Referring to *Gwinnell v. Herbert*, he says, "I agree that the indorser of a note cannot properly be treated as the maker thereof, whether he be the payee or indorsee thereof, or a third person. But I am unable to perceive, why he does not stand in the same situation as the drawer or indorser of a bill. In each case, the indorsement creates a collateral liability only. The maker of a note and the acceptor of a bill are the primary parties to pay the same. Every indorsement on accepted bill is precisely in effect the same as an indorsement of a note; and each imports the same liability." In *Plimley v. Westley* (c), *Tindal*, C. J., assumes that the defendant's indorsement might have operated as a making of a new note; but in that case the note was not payable to order. It is submitted that the defendant is estopped from questioning his indorsement, *Macgregor v. Rhodes* (d); and its operation as against himself; *Hill v. Lewis* (e). When the defendant accepted for honour of the drawer a bill payable to the order of a fictitious person, the Court held that he was estopped from questioning the indorsement of the payee, and that the bill must be considered to have been accepted as a bill payable to bearer; *Phillips v. Im Thurn* (f).

The *Attorney General* in reply. If the defendant was liable at all, it would be as on a collateral undertaking.

(a) 1 C. M. & R. 440. (b) § 128, in nota. (c) 2 B. N. C. 252.
 (d) 25 L. J. Q. B. 320. (e) 1 Salk. 132. (f) 35 L. J. C. P. 220.

STEPHEN, C. J. The first question is whether the judgment can be sustained on the common counts. The case for appeal as settled by the learned Judge, states his judgment as follows :—"I am further of opinion that the promissory note, the letters of the 12th and 13th and 24th of July referring to that note, and the evidence given by the plaintiff as to what passed between him and the defendant during the first or principal interview which they had one with the other, and which evidence, I fully believe, abundantly established plaintiff's right to recover under the count for money found to be due from defendant to the plaintiff on accounts stated between them." With the conclusions of the learned Judge as jury, we have nothing to do. But it is clear to my mind that this statement is his Honor's judgment on a point of law ; and I am also clearly of opinion that there was no evidence whatever before the Judge of an account stated. It cannot be that a District Court Judge can shut out an appeal by saying that he gave judgment on evidence that satisfied his mind. The conclusions drawn by the Judge were a matter of law, and there was in my opinion no evidence to justify these conclusions. The learned Judge thought the defendant's conduct was dishonest. It appears that he being the landlord of *Hopes*, and wishing to oblige his tenant tells the plaintiff that he will become security for the money he may lend the tenant ; and that afterwards when the money has been lent by the plaintiff, and he asks for it, the defendant refuses to pay it. Such conduct is dishonest. But the Court cannot stretch the law so as to oblige a man to pay money which by law he is not obliged to pay.

I am also of opinion that the plaintiff cannot recover on the second and third counts. In the one, delivery is alleged ; but in the case of an instrument like this delivery was not sufficient. In the other count, an indorsement is alleged ; but in order to make a valid indorsement, the indorser must have a title to indorse. According to the cases, a person who puts his name on the back of a bill of exchange, with intent to incur thereby a liability as an indorser, but to whom the bill

1866.
WILLIAMS
V.
BURLEY.

1866.

WILLIAMS
v.
BURLEY.

has not been indorsed, stands in the position of a new *drawer*. And accordingly if declared against as such, he will be held liable in that character—but not as an *indorser*. For no one can be so deemed who has not in him at the time a property in the instrument. But he who similarly puts his name on the back of a *promissory note* is not within the rule; for he is no “*drawer*” of such an instrument, and there is no authority for holding that he can thereby be in the position of an *acceptor* or *maker*. So that this defendant was not liable on the promissory note at all. And it is clear that he is not liable as a *surety*, for the want of a sufficient agreement in writing within the statute of frauds. Then, as he was not liable either on the promissory note, or as a *surety*, he cannot be made liable as on an account stated, by the mere subsequent act of acknowledging erroneously that he was liable or by promising to pay.

HARGRAVE, J., and CHEEKE, J., concurred.

Judgment for the appellant.

September 5.

MILLER *against* KEOGH (a).

A promise by an uncertificated insolvent to pay a debt proveable against his estate creates a new debt; and an action will lie for such new debt before certificate obtained.

THE declaration was for work, journeys and attendances, done, performed, and bestowed by plaintiff as attorney and solicitor for the defendant, and for fees payable in respect thereof, and for materials and necessary things by plaintiff provided, in and about such work, and for money paid, laid out, and expended by plaintiff in and about such work and labour, and for money due on accounts stated.

Plea, as to parcel of the money claimed, that the defendant's estate was duly sequestrated; and that the causes of action pleaded to arose before such sequestration.

Replication, that after the sequestration of insolvent's estate, and before the commencement of the action, the defendant ratified and confirmed the said promises in the

(a) Before Stephen, C. J., Hargrave, J., and Cheeke, J.

declaration declared on and pleaded to in the said plea, and then promised the plaintiff to pay him the said sum sued for and pleaded to in the said plea.

Demurrer and joinder.

1866.
MILLER
v.
KEOGH.

Stephen in support of the demurrer. The replication is bad. The question is whether an insolvent is bound by a new promise made by him while his estate is still under sequestration. By section 31 of 5 Vic., No. 17, no action can be brought against any insolvent for any debt or demand proveable against his estate. This disability is in no degree affected by the ratification, confirmation, and promise alleged in the replication. Can an insolvent be sued because he says he will pay the debt? It is submitted that section 31 was enacted for the protection of the creditors, and not for that of the insolvent. There could be no execution against the assets in the hands of the assignee, and it is his duty to apply these assets to the use of the creditors. It is submitted that no action will lie on a promise made before certificate, until after certificate granted. But in this case the action has been commenced before the certificate has been granted. The cases of *Kirkpatrick v. Tattersall* (a), and *Earle v. Oliver* (b) only show that a promise to pay personally and not out of his estate, whether before or after certificate, and pending sequestration, binds the insolvent after his certificate. The debt so barred is considered a sufficient consideration for every promise, absolute or unqualified, qualified or conditional, to pay it. But here the insolvent had obtained no certificate; he had, therefore, never ceased to be simply an insolvent. There was no consideration, for there was no debt. He referred to *Selwyn's N. P.* (c).

Darley in support of the replication. The replication amounts to a new assignment; and says, in effect, "True, I cannot bring the action for the old debt; but you have since promised to pay it, and for this promise the consideration is the old debt." The replication

(a) 13 M. & W. 766. (b) 2 Exch. 71. (c) 12th ed., p. 53.

1866.

MILLER

v.

KEOGH.

must be looked at here as if it were a declaration. The question is, can an insolvent be sued for a promise made after insolvency and before certificate granted? It has been recently decided in England, that a second fiat against a trader who has not obtained his certificate under the first is not void; *Morgan v. Knight* (a). [Stephen, C. J. This point has been, I believe, decided in this Court some years ago.] An uncertificated insolvent may contract debts, and therefore may be sued for them; *Herbert v. Sayer* (b). It is clear, as has been admitted, that in England a bankrupt may be sued on a promise made before certificate to pay a debt proveable against his estate; *Earle v. Oliver* (c), *Roberts v. Morgan* (d). The estate of an insolvent although uncertificated, it is submitted, may be sequestrated a second time. There may be, it is plain, large assets in the second sequestration by reason of the laches of the official assignee under the first sequestration; and, it is submitted, that the debt here sued for could be proved against his estate under a second sequestration. Section 31 has nothing to do with the question before the Court.

Stephen in reply. This point was not taken in *Earle v. Oliver*; and from the case itself it is clear that the certificate must have been granted before suit. This old debt now sued for could not be proved under a second sequestration. Here the plaintiff is suing on the old promise, for work and labour, &c. On a promise made by a bankrupt to pay a debt barred by his bankruptcy, the old debt is revived, and it is no new transaction. And the proving such debt under a second sequestration would be proving the same debt twice under different sequestrations, and would get rid of section 31 altogether, by the mere promise of an insolvent to pay. It has been argued, that the plaintiff is not suing for a debt proveable under the existing sequestration, whereas it is admitted by the replication that he is suing for such a debt.

STEPHEN, C. J. I am of opinion that the plaintiff is entitled to judgment. The declaration is for work and

(a) 33 L. J. C. P. 168.
(c) 2 Exch. 71.

(b) 5 Q. B. 965.
(d) 2 Esp. 736.

labour, and an implied promise is relied on. But the replication is founded on an express promise. The debt sued for is in effect a new one. It is the case of a new contract founded on the past consideration of the old debt. The old debt does not revive, but a new cause of action not proveable against his estate has arisen, and therefore the 31st section does not apply. If the insolvent may waive the benefit of the certificate, why may he not waive the benefit of the 31st section, which is equally a bar? But it seems to me that the plaintiff should in point of form have newly assigned in his replication, and not have replied the new promise as a bar or answer to the statute, or he should have framed his declaration on his present cause of action. The plaintiff should in strictness have shown that he was suing for another cause of action than the one pleaded to. But substantially the point raised is the same.

HARGRAVE, J., and CHEEKE, J., concurred.

Judgment for the plaintiff.

THE QUEEN *against* SHIELD (a).

June 15.

SPECIAL case reserved for the consideration of the Judges, under the 18 Vic., No. 8.

“In this case the defendant was tried before me at the last sittings, at Darlinghurst, for obtaining goods and money under false pretences.

“It was clearly proved that the defendant went into the shop of a Mr. *Lewis*, in William-street, and purchased some goods, and gave in payment two cheques—one of them being the cheque mentioned in the information, and on which the charge was founded. Mr. *Lewis* gave the defendant the goods, and the difference between the price of the goods and the amount of the cheques in money. The cheque in question was drawn on the Deniliquin Branch of the Bank of New South Wales.

“The defendant when arrested said that if he did not think he had money in the bank he would not have done it.

(a) Before *Stephen*, C. J., *Hargrave*, J., and *Faucett*, J.

1866.

MILLER
v.
KROGH.

Upon an information for obtaining money by false pretences, by means of a cheque signed by the prisoner, it is sufficient to call the bank accountant to prove that the prisoner kept no account at the bank in which the cheque was drawn, and that no money was paid in there to his credit, during the preceding four months, without producing the books or calling the teller.

1866.
The QUEEN
v.
SHIELD.

“To prove that the defendant had no account at the Deniliquin Branch of the Bank of New South Wales, and had no money deposited to his account, and that consequently the cheque was valueless, Mr. *Carkeet* was called, and he stated that he was ledger-keeper of the Branch Bank at Deniliquin for four months. That before that he had been in another branch of the bank; that it was his duty to make entries of persons having accounts at the bank; that he never did open an account at the bank in the defendant's name; that he had looked into the books of the bank for some time; and that there is no account in the office in the defendant's name since the opening of the bank in Deniliquin.

“The defendant had also stated that he expected a sum of money to be deposited in the bank at Deniliquin to his credit.

“As to this, Mr. *Carkeet* stated that he knew of no money having been deposited to the defendant's credit; that it was the duty of the teller to receive such a deposit, and to put the slip (acknowledging the receipt of the deposit) on the file; and that it was his (Mr. *Carkeet's*) duty to take the slip and enter it in the ledger and the cash book; and no such slip was found by him on the file, and consequently that no such entry was made by him in the ledger or cash book.

“As to this latter point, Mr. *Carkeet's* evidence was clearly admissible as to the timewithin which the alleged deposit was to have been made.

“I have reserved the following questions for the consideration of the Court:—1. Whether Mr. *Carkeet's* evidence was admissible to prove that there was no account at the Deniliquin Branch of the bank in the defendant's name, without producing the books of the bank. 2. Whether Mr. *Carkeet's* evidence was sufficient evidence to go to the jury, that no deposit had been placed during his time to defendant's account.

P. FAUCETT.”

Butler for the Crown. The law is thus expressed in *Taylor* on Evidence (a):—“A sixth relaxation of the

rule demanding primary proof has been admitted where the evidence refused is the result of voluminous facts, or of the inspection of many books and papers, the examination of which could not conveniently take place in Court." Thus, in *R. v. Brannan (a)*, on an indictment for uttering a forged cheque in the name of *J. W.* on Messrs. *C. G. and Co.* who were army agents and bankers, it was proved by a clerk in the former department that he did not know of any customer named *J. W.*, and that he had been told by the other clerks that there was not any such customer in the banking department. And it was held that this was sufficient proof, on the part of the prosecution, to call upon the prisoner to show that there was in fact such a person as *J. W.* having an account with Messrs. *C. G. and Co.*, and, in the absence of such proof, was sufficient by itself for the consideration of the jury. And similar evidence has been recently considered sufficient to go to the jury in *R. v. Ashby (b)*. *R. v. King (c)* was referred to.

1866.
The QUEEN
v.
SHIELD.

STEPHEN, C. J. I think that the secondary evidence was admissible, and that the two cases referred to are authorities in favour of the conviction. The principle is that in order to prove that a prisoner had not an account at a particular bank, it is not necessary to produce the books which might show that he had such an account. If it were necessary to show the contents of these books then it would be necessary to produce them. But there is a difference between proving that a thing does not exist and proving that a thing does exist in a particular way. Although the admissibility of secondary evidence in a case like this is a violation of the rule demanding primary proof, it is permitted on account of the extreme inconvenience of the opposite course which might involve the production of fifty books. It is sufficient for the clerk to say that he is acquainted with the books; that he knows generally the customers of the bank; that he has examined the books, and that he

(a) 6 C. & P. 326.

(b) 2 F. & F. 560.

(c) 5 C. & P. 123.

1866.
The QUEEN
v.
SHIELD.

knows that the prisoner has not an account there. I am further of opinion that the evidence given was *prima facie* sufficient to throw the burden on the other side of showing that the clerk's evidence was mistaken.

HARGRAVE, J. This evidence comes within the principle of the exception mentioned by Mr. Taylor. The production of the books would cause unnecessary inconvenience.

FAUCETT, J. I had some doubt which has now been removed. This kind of evidence is the result of the examination of a number of documents, and its value depends on the honesty of the witness. As to the other point I had less doubt. It seemed to me that sufficient proof was given of the course of dealing in the bank. Every step, except the first, namely, the receipt of money by the teller, was shown. It appeared that no slip had been put on the file; in fact, every step was disproved by the witness whose duty it was to make himself acquainted with the circumstances if they had occurred; and, therefore, it rested with the prisoner to rebut the inference thus raised and to show that the clerk had neglected his duty.

Conviction affirmed.

July 2.

BROWN *against* BROWN (a).

The testator was at the time of his death living with Jane B. as his wife, the ceremony

THIS was an appeal from the decision of *Hargrave, J.*, on the construction of a will. The question was, mainly, who was to take the executorship? The testator was living with *Jane Brown* as his wife, the ceremony of marriage having passed between them. But in reality his wife was one *Hannah Jane B.* He had not, however, lived with or recognised the latter for some years; and she on her part believing, for certain reasons, that her marriage with the testator was invalid, had been married to and living with one *C.* By his will the testator first devised certain lands to "my wife, *Jane B.*, her heirs, &c.;" and then there being no intervening reference to any wife, he said, "as to all the residue, &c., I devise the same to my wife, and hereby appoint her executrix of this my will." Held, that *Jane B.* took under this devise, and was entitled to probate as executrix.

(a) Before *Stephen, C. J.*, *Hargrave, J.*, and *Faucett, J.*

of marriage having passed between them. But in reality his wife was one *Hannah Jane Brown*. He had not, however, lived with or recognised the latter for some years; and she, on her part, believing (for certain reasons) that her marriage with *Brown* was invalid, had prosecuted *Brown* for bigamy, and had been afterwards married to and living with one *Clissold*. By his will the testator made, first, a bequest in these words, "I give to my wife, *Jane Brown*, her heirs, &c.," certain lands. Then, in the last clause, there being no intervening reference to any wife, he said as follows—"as to all the residue of my estate, I devise the same to my wife, and hereby appoint her executrix of this my will." *Hargrave, J.*, had held that the testator intended *Jane Brown* to be his executrix, and that she was entitled to probate.

1866.
BROWN
v.
BROWN.

Isaacs for the appellant. The absence of the word "said" in the last clause, shows that the real wife was here meant, the only person to which the appellation "wife" can apply. The following cases were cited—*Turner v. Brittain (a)*, *Re Davenport (b)*, and *Re Overhill (c)*. The same word in a will may be taken to mean, according to circumstances, different things or persons. If the appellation, "my wife," does strictly and legally apply to *Hannah Jane*, and cannot so apply to the reputed wife *Jane*, the law will apply the designation accordingly.

Darley for the respondent. The circumstances clearly show that the testator could not have meant to call wife, and as such give property to a woman who had never lived with him as a wife, but had actually prosecuted him for bigamy in marrying her, and had been living for fifteen years with *Clissold* as wife of the latter, bearing his name, and being the mother of several children by him as the testator is proved to have known; *River's case (d)*, *Doe v. Rouse (e)*, *Hiscocks v. Hiscocks (f)*, *Wigram* on wills (*g*). *Jane* was unquestionably regarded

(a) 3 N. R. 21.

(b) 1 Sm. & G. 126.

(c) 1 Sm. & G. 362; 22 L. J. Ch. 485. See also *Delmare v. Robelle*, 1 Ves. 413; *Evans v. Davies*, 7 Hare 498; *Dover v. Alexander*, 2 Hare 275.

(d) 1 Ark. 410. (e) 5 C. B. 422. (f) 5 M. & W. 367. (g) p. 73.

1886.

BROWN
v.
BROWN.

by *Brown* as his only wife for the purposes of the will; he had been married to her, the former wife (believed never to have been so because of the former marriage) having repudiated him. *Jane* was his wife *de facto*; she lived with the testator up to the time of his death, as his wife; and he at all events knew of no other. The Court under such circumstances had no right to conclude that *Hannah Jane* (Mrs. *Clissold*) was intended by the testator, and not *Jane*, merely because of the former's legally satisfying the appellation used by him (*a*).

STEPHEN, C. J. I have no doubt that *Jane* is the person indicated, and therefore entitled to probate. The testator speaks of his "wife" in distinct words as *Jane Brown*. But he must have known that he could not have two wives. Therefore, when for the purposes of a devise in his will, he says in effect that his wife is *Jane Brown*, there is no reasonable ground for supposing that he meant to call another person by the same designation used subsequently in the instrument. But if there really be a legitimate wife, and *Jane* is shown to be only the reputed and so called wife, then it becomes a question which of the two were meant by the second appellation. The Court must then look at the surrounding circumstances, and these all tend strongly to show that *Jane* was the only object contemplated in each instance. There were here, in fact, two marriages, and the statutes of bigamy have always up to this day spoken in terms of the second as "a marriage," and the actual husband or wife as the "former" husband or wife, showing that the appellation may for certain purposes be equally applicable to both. The appeal must therefore be dismissed with costs, and appellant (the person contesting the probate applied for by *Jane Brown*) to pay her own costs in the suit. It has been urged for her that they should be paid out of the assets, but this would be, as we think, most unjust.

HARGRAVE, J., and FAUCETT, J., concurred.

Judgment for the respondent.

(a) See 1 Greenl. 410 in nota; 1 Jarm. on Wills 400.

1866.

PALMER *against* WHITFIELD (*a*).

July 6.

APPEAL from a judgment in the Metropolitan District Court.

"In this case, which was tried on the 19th and 20th July, 1865, before Mr. District Court Judge *Dowling*, and a verdict given for the plaintiff, the plaintiff sought to recover from the defendant the sum of £94 10s. for stuffed birds alleged to have been sold and delivered by the plaintiff to the defendant. Plea, never indebted.

"The counsel for the plaintiff, in opening the case to the jury, stated that the case had been tried before; that the genuineness of the plaintiff's account-book had been impugned; and that if its genuineness were impugned in this trial, the plaintiff would call evidence to show its genuineness.

"After the plaintiff's evidence as to the said sale, the defendant's counsel not objecting, an account-book of the plaintiff's, containing the entry of the sale of the said to the said *George Whitfield*, was put in evidence by the plaintiff, and a witness for the plaintiff (*George Palmer*, the plaintiff's son,) stated that he made the said entry, and that he generally made the entries from day to day, and that he could not explain the alterations and incorrectness in the dates.

"The defendant (among other witnesses) examined Mr. *Archibald Campbell*, who stated that, looking at the said account-book, he believed the entries down to a recent period had been made within a short time; that had they been made day by day the leaves would have been more worn and dirty; that, in his opinion, the

In an action for a case of birds sold by the plaintiff to the defendant, the plaintiff's day-book, containing an entry of the sale in question, was put in evidence by the plaintiff, as part of his case, the defendant's counsel not objecting, and then evidence was given by the defendant questioning the fact of the entries being contemporaneous with the alleged sale; and his Honor allowed evidence to be given in reply, that a particular entry in plaintiff's day-book, viz., of a sale of birds to one *W.*, was correct. *Held*, that, although evidence in reply was properly admitted, the evidence of this specific transaction with *W.* was altogether inadmissible.

The case in question was alleged to have been sold by the plaintiff in his shop to the defendant personally on the 13th October, and delivered in the same shop to the defendant on the 14th. Two witnesses for the defendant stated that the defendant was confined to his house on both days, except that one of these witnesses admitted that he went out during the evening of the 13th. The Judge told the jury that the evidence of these witnesses might more properly be termed circumstantial. *Held*, that, although such direction was inaccurate, it was not sufficient ground for granting a new trial.

(*a*) Before *Stephen*, C. J., *Checke*, J., and *Fraucett*, J.

1866.
PALMER
v.
WHITFIELD.

whole book had been made up by some one within a recent period.

"The plaintiff, by leave of the Judge, called, in reply, one *Galvin*, who stated that he knew plaintiff's son; that he had been to his father's shop very often, and had seen the said book before; he had seen the boy making entries at various different times in this very book. Defendant's counsel objected to the reception of this evidence, but I admitted it on the ground that the whole book was impugned as not being *bona fide*, that is to say, that the entries in the said book had not been made *de die in diem*, but had probably been copied from some other book, the dates and entries being altered.

"The plaintiff, also, in reply, by leave of the Judge, called another witness to prove that he had seen the plaintiff's son at various different times making entries in the said book, and that he knew several of the entries made in the said book to be correct, and in particular one of a sale to one *J. Welch*, which was an entry of a transaction which he knew had taken place according to the said entry (this entry was not connected with the transaction in question in the case). Defendant's counsel objected to the reception of this evidence, but I admitted it on the same ground as the former questions.

"Defendant called a witness to prove that he would not believe plaintiff on his oath. I allowed plaintiff's counsel to ask this witness in cross-examination (defendant's counsel objecting), 'Would you believe him if he swore you were an honest man?'

"The plaintiff swore that he sold these birds to the said *George Whitfield* on the 13th October, 1864; two of the said *George Whitfield's* daughters swore that on the 13th, 14th, and 15th October, 1864, he was confined to the house through illness; one of them stated that he was in bed all the day of the 14th October, but that their father came for them from a party on the 13th.

"The evidence of Doctor *Cox*, one of the defendant's witnesses, was, that he attended the late *George Whitfield* in 1864; that *Whitfield* came to his house on the 10th October; that on the 17th, 18th, and 19th, he saw

him in his own house ; he was in bed on the 17th ; he saw him twice on that day, and he told him (witness) that he had been in bed the day before.

1866.
PALMER
v.
WHITFIELD.

"In summing up, I alluded to a statement of the counsel for the defence, that the only direct evidence in the case was that of the plaintiff on the one hand, and that of the said daughters on the other ; and I remarked to the jury, among other things, that the evidence of the plaintiff as to the alleged sale might be called direct, but that of the daughters might more properly be termed circumstantial.

"The questions for the decision of the Court are :—
1. Was I right in receiving such of the plaintiff's evidence in reply as was objected to as hereinbefore mentioned ? 2. Was I right in my said remarks to the jury ?

"Dated the 25th day of August, A.D. 1865.

"(Signed) JAMES S. DOWLING,

"Judge of the Metropolitan and Coast District Court,
holden at Sydney."

Stephen for the appellant. The first objection is, that evidence was received in reply that one entry in the plaintiff's day-book (*i.e.*, of the sale to one *Welch*,) was correct, such entry having no connection whatever with the case in hand. The Judge ought not to allow a witness, who is called in reply, to select one item which the plaintiff selects as proving a valid sale, and leave the jury to infer, from the existence of that one genuine entry, that the entry in contest is genuine. Evidence that the plaintiff sold a number of birds on a particular occasion to *A.* is no evidence that he made the sale disputed in this action. The book was put in evidence, not by the defendant, but by the plaintiff ; and yet the plaintiff was allowed to call evidence in reply to set it up.

Sir *W. Manning* for the defendant. On the first objection, the evidence was admissible because the truthfulness and accuracy of the day-book, its general authenticity and genuineness, were impugned by the defendant's

1866.
PALMER
V.
WHITFIELD.

case. [Stephen, C. J. But it was not shown that the sale to *Welch* was actually entered in the book contemporaneously with the sale. Was the fact admissible, therefore, for the plaintiff whensoever given in evidence?] The practice as to evidence in reply was thus enunciated in *Taylor on Evidence* (a):—In deciding upon the admissibility of such evidence, “regard must be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the Judge in the exercise of his discretion.” It was more satisfactory for the jury to have an opportunity of testing the soundness of Mr. *Campbell's* conclusions as an expert, and the course pursued was not likely to produce injustice. [*Faucett, J.* What opportunity had the defendant of disproving this evidence as to *Welch*?]

STEPHEN, C. J. On the first point, I am of opinion that there must be a new trial. I should like to have known whether the Judge told the jury that if it was a case of extreme doubt, upon which they could not make up their minds, it was their duty to find for the defendant. If he did not so direct the jury, it might be ground for an appeal. I am not prepared to say that evidence was wrongly admitted in reply. Because it is stated that the plaintiff's counsel, in opening his case, had said that if the genuineness of the account-book was impugned, he should be prepared to give evidence to prove its genuineness. On the whole, I am inclined to think that evidence was rightly admitted, if such evidence went to show that these entries had been made at the time when they purported to have been made. But the evidence given was not admissible at any stage of the case. How can evidence that *Welch* got goods at the time of this entry set up the entry in dispute? The object of Mr. *Campbell's* evidence was not to show that these entries were fictitious, but that they were not made at the time when they purported to have been made. I should think, therefore, that evidence might have been given to show that these entries were cotem-

poraneous. The evidence, however, allowed to be given as to the transaction with *Welch* was calculated to mislead the jury, who, in my opinion, are much impressed by evidence in reply. By this evidence the jury were led to suppose that because *Welch* obtained goods on the day on which that particular entry was made, they were justified in inferring that these entries were correct. And on the second, I also think that there should be a new trial; for proof of an *alibi* is direct positive testimony. The evidence of the defendant's two witnesses, that the defendant was confined to his bed on the day of the alleged sale was direct; and, if believed, got rid altogether of the evidence in chief. Such evidence, therefore, was in no sense circumstantial or inferential, but quite as positive and direct as that of the plaintiff himself.

1866.
PALMER
V.
WHITFIELD.

CHEEKE, J. In my opinion there should be a new trial. The evidence as to the entries as to *Welch* was improperly received. But I do not think the language used by the Judge could have misled the jury.

FAUCETT, J. On the fresh point, I think there ought to be a new trial; for the evidence as to the transaction with *Welch* is not only, in my opinion, inadmissible at any stage of the proceedings, but is calculated to mislead the jury. The Judge was, in my opinion, right in admitting evidence in reply. The genuineness of the entries in the book were not impugned until Mr. *Campbell* was called, and therefore I think witnesses might have been called to show that the entries were made at the time when they purported to have been made. But the evidence admitted was that a particular transaction took place on the day on which the entry as to that transaction was made. That evidence was irrelevant to the question whether these entries were made at the time when they purported to have been made.

On the other point, I agree with his Honor the Chief Justice in thinking that circumstantial is not the correct term to describe the class of evidence referred to. The observation of the Judge is, so far, calculated to mislead

1866.
PALMER
v.
WHITFIELD.

the jury by leading them to suppose that the evidence in question was of a weaker character than more direct testimony. But I doubt whether that mistake would be a sufficient ground for a new trial.

New trial granted. Costs of the appeal to the defendant.

September 29.

FANNING and another *against* SIMMONS (a).

The plaintiffs having applied to a Judge for an order to restrain the defendant from pleading, the Judge granted the application subject to the payment of costs by the plaintiffs; the plaintiffs then wrote to the defendant that they should not act on the order as they intended to appeal from it to the Court; and they thereupon moved the

BUTLER, for the plaintiff, moved to rescind an order of *Hargrave, J.*, setting aside a judgment signed by the plaintiff for want of a plea.

Darley showed cause.

The facts of this case and the nature of the application sufficiently appear from the judgments of their Honors. The following cases were referred to: *Clark v. Stocken* (a), *Whaley v. Williamson* (b), *Landells v. Ball* (c), *Pugh v. Kerr* (d), *Brown v. Millington* (e), *Maunder v. Collett* (f), *Thompson v. Parish* (g), *Ch. Arch. Pr.* (h), *Le Bret v. Papillon* (i), *Harris v. James* (k), *Ch. Pl.* (l), *Horton v. Westminster Improvement Commissioners* (m), *Giraud v. Austen* (n).

Cur. adr. vult.

Court to rescind the order, and their motion was dismissed with costs. The defendant having allowed his time for pleading to expire without pleading the plaintiffs signed judgment and claimed the costs of the action. *Held* (*Hargrave, J., dissentiente*) that the plaintiffs had abandoned the order and that therefore the judgment was regularly signed.

Where no principle or very large sum is involved, and the question is within the discretion of the Judge, the Court will not entertain a motion for reviewing the decision of the Judge as to costs, although such discretion has been wrongly exercised.

(a) Before *Stephen, C.J., Hargrave, J., and Cheeke, J.*

(a) 2 B. N. C. 651.

(b) 5 B. N. C. 200.

(c) 16 L. J. Q. B. 370.

(d) 5 M. & W. 166.

(e) 22 L. J. Ex. 133.

(f) 16 L. J. C. P. 17.

(g) 28 L. J. C. P. 153.

(h) pp. 1578, 1596.

(i) 4 East 507.

(k) 9 East 81.

(l) 1 Vol., p. 578, 688.

(m) 7 Exch. 911; 21 L. J. Ex. 325.

(n) 1 Dowl. N. S. 703.

Their Honors now delivered judgment in this case as follows :—

STEPHEN, C. J. It is much to be regretted, that the proceedings taken in this case—involving it is true some important points of practice, but chiefly contested on a question of costs—should again have come before the Court, to the exclusion of other cases of much greater public interest. Our decision, however, is invoked in the matter, and it must be given.

The facts appear to be these. The plaintiffs sued as holders of a cheque, given them by the defendant in payment for certain spirits (represented by bonding certificates,) sold to him by the plaintiffs, but which cheque on presentation was dishonoured. At this time, therefore, they had a clear and indefeasible right of action; and the defendant consequently could not, whatever circumstances might afterwards arise, entitle himself to the costs so far of the suit—nor, in any event, plead to it without swearing to the truth of his defence. In this state of things, the plaintiffs obtained information which led them to deal with the defendant criminally; they charging him with having obtained the goods by fraud. On that charge, the defendant was committed for trial; pending which, and with knowledge of the fact, his attorney entered an appearance to the action. This was done, as he suggests, in order to prevent the plaintiffs from obtaining judgment. But, if the contract was not rescinded by the criminal charge, the plaintiffs were entitled to judgment—for the debt, as well as their costs. If, on the other hand, the contract was so rescinded, they were still entitled to costs up to that date. I shall assume, however, that the step thus taken was a proper one. But, whether so or not, it compelled the plaintiffs' attorneys thereupon to file a declaration; for otherwise the defendant could have signed, in due course, a judgment of *non pros*. Shortly afterwards, the defendant was tried and convicted; and the plaintiffs, on application to the Court, were awarded a restoration of their certificates.

1866.

FANNING
and another
v.
SIMMONS.

November 19.

1866.

FANNING
and another
v.
SIMMONS.

This, of course, put an end to the contract ; and the exact position of the parties was then as follows. The defendant became entitled to plead the new matter, not to the action as it previously stood, but to the *further maintenance* of the action ; and, on this being done, the plaintiffs would have been entitled, as already indicated, to their costs to that date. But, in the then state of things, the incurring of more expense on either side was to be deprecated, and costs were little likely to be recovered, from a convicted defendant without funds. If, however, the plaintiffs discontinued the action before plea, they would in the ordinary course have to pay costs to the defendant. In this dilemma, the plaintiffs' attorneys—after fruitless oral attempts at a compromise,—wrote to the defendant's attorney proposing a discontinuance, without costs on either side. But the latter, who (as I have shown) had already put the plaintiffs to the expense of a declaration, peremptorily refused those terms ; insisted on the plaintiffs discontinuing subject to costs, and threatened that he would plead, unless they discontinued within three days.

I pause here to repeat the opinion, which I expressed on the first hearing of this matter, that conduct like this in any attorney, the nature of the case and its circumstances being considered, is discreditable. It was on that occasion, suggested on his behalf, that I could not know all the circumstances ; and the suggestion is not an uncommon one in such cases. I have read, however, and with care, every portion of the evidence ; and there can be no mistake on this point. It may be that the attorney thought his client had been hardly used ; and many similar topics may be urged. But the letter of 8th August, and the reply of the 10th, are before me. In the former the attorneys thus express themselves :—
“ There is now no object in proceeding further, *except for the purpose of recovering the plaintiffs' costs, which we are prepared to waive.* But we decline to give notice of discontinuance, and thus subject our clients to the payment of *your* costs ; and, in the event of your

proceeding with the defence after this notice, we shall apply to a Judge to restrain you." I repeat my opinion, that the offer there made ought to have been accepted; and it is impossible not to feel that its refusal (the contest at that time not involving costs of above five pounds, apparently, on either side) has been the main cause of all this now complicated litigation. Its refusal, moreover, was quite as injurious to the defendant, had he been in a position to pay costs, as it was practically to the plaintiffs. But the object was to force the latter to *pay his* costs, by unjustly driving them either to discontinue or to proceed in the action virtually at their own expense against a pauper. Such an object, in my opinion, should not be pursued by an attorney whether to save the pocket of his client or his own.

The plaintiffs, or their attorneys, conceiving that a Judge would under the circumstances restrain the defendant from pleading as threatened, took out a summons returnable in Chambers to stay proceedings on his part. The Judge made the order asked for; but (erroneously, as I venture to think,) subject to the payment of the very costs which it was the object of the application to avoid. And not only so; his Honor subjected it, in addition, to payment by the plaintiffs of the costs of that application. In point of fact, as I collect, their exact position and rights were not explained to the Judge; and it seems to have been assumed that the plaintiffs would in any event be bound to discontinue, or that at any rate they would have to pay costs should the defendant plead. On no other supposition can that order be understood. In the actual state of things it came to this; that the plaintiffs who would be entitled to judgment for costs from the defendant should he plead, but were willing to waive that right if he would let them retire, neither paying nor receiving costs, from a litigation become practically useless, were only allowed to do so on conditions which gave every thing, costs and all, to their adversary.

It was not to be expected that the plaintiffs would accept the privilege of discontinuing on terms like these.

1866.

FANNING
and another
v.
SIMMONS.

1866.

FANNING
and another
v.
SIMMONS.

Their attorneys, therefore, on the next morning, 17th August, informed the defendant's attorney by letter of that date (the receipt of which is not attempted to be denied) that they should not act on it. The words are, that they had drawn up and taken out the order in question, *but should not serve it, as they intended to appeal from it to the Court.* The attorney, however, true to his object, paid no attention to this. At the expiration of a week, without searching for the order already signed, or taking any step in reference thereto, he procured from the Judge another of the same date, which in terms not merely stayed the defendant's proceedings, but all on the part of the plaintiffs also; and ordered the latter to pay costs, absolutely. Then, serving this order, the attorney on the next morning obtains an appointment to tax costs, pursuant to its terms.

His counsel gravely contended that the order thus secondly obtained was a correct one; that the order first signed, making the payment of costs conditional (that is to say, directing a stay of proceedings only on such payment), was not in accordance with the order pronounced; and that the course taken, therefore, was justifiable. I am altogether of a different opinion. In the first place the Judge's summons now in my hand asks, only, for a stay of proceedings by the defendant; and it is clear that the plaintiffs required no more. All that they wanted was to restrain the defendant *from pleading*, as a step utterly idle and serving only a vexatious purpose. To have asked for a stay of their own proceedings with his would have been absurd; for, until the defendant should have pleaded, there was no step to be taken. The plaintiffs could of their own accord, if they chose, discontinue the action; but this the attorneys had already announced their intention not to do. Now the Judge's note of his own order is that the application *asked for* was granted. The defendant's attorney expressly says the same. On what ground, therefore, could he claim an order staying other proceedings than his own?

But, in the second place, if the plaintiffs' proceedings and his own alike were stayed (one or both), on what

possible ground could those parties be made peremptorily to pay costs? They had done no wrong; their only object was to prevent a pauper defendant from continuing, and thereby forcing *them* to continue, a then useless litigation. To secure this their attorneys offered the surrender of their own costs; to which, had the defendant continued that litigation, they would confessedly have been entitled. And, for asking this just measure of protection, under the circumstances which I have detailed, it is maintained that the plaintiffs were properly directed to pay the costs of that defendant, both of the action and of the application; and, in addition, to stay all further proceedings of their own. It appears clearly to me that no such order was ever meant to be made; and, further, that—even if made by the Judge—the attorney had no right to draw it up and assume to act on it after notice of the order already signed and of the plaintiffs' intention to appeal therefrom. His course was to have demanded a copy (since the plaintiffs could not according to strict practice serve it, without waiving their appeal), and then applied to correct the first order, if he could, by the Judge's notes or recollection.

That order, as drawn, it was admitted, is a conditional one. So was the order pronounced. It is quite idle, it seems to me, to attempt to distinguish in substance between them. The note is as follows:—"Application granted, to stay proceedings as asked, on payment of costs," &c. The order is in simply equivalent terms:—"I order that upon payment by the plaintiffs to Mr. Lery of," &c., "all further proceedings by the defendant be stayed." If the one be an order on certain conditions only, so is equally the other. In each case the defendant is at the plaintiffs' instance restrained from proceeding, provided they pay him his costs. But such an order, it is clear, may be acted on or not at discretion. There is a host of cases establishing that rule:—I need not cite them. In some instances, no doubt, the circumstances may show an engagement to act on the order, if obtained by the party applying, as in *Horton v. the Westminster Commissioners* (a). But it cannot be contended that

1866.

FANNING
and another
v.
SIMMONS.

1866.

FANNING
and another
v.
SIMMONS.

there was any such engagement here. The plaintiffs certainly got, nominally, what they asked for, but it was on terms which they had previously rejected and protested against, and against which, at the earliest moment after taking out the order (as by our practice it devolved on them to do), their attorneys gave written notice that they should appeal. That was ample intimation on their part of an election not to accept the supposed boon, and therefore, according to our recent decision in *ex parte Monson* (where the service was under protest), even a service of the Judge's order after such a notice would not waive the right. It seems, indeed, by *Brown v. Middleton (a)* that a conditional order is never waived by service of it.

The next step taken was, a motion by the plaintiffs to this Court, to rescind or vary the first signed order; and that all proceedings by the defendant should be stayed, without any payment of costs. But it appeared to the Court, that—as all such proceedings were already stayed, if the plaintiffs chose to avail themselves of that order—the appeal was simply one (in effect) for costs; and therefore, according to the general rule, inadmissible. The motion was, therefore, dismissed with costs. And, the case being disposed of on that ground, no other objection was gone into. In truth, the appeal itself was a mistake. The plaintiffs, having elected not to act under the order, should have either signed judgment for want of a plea, after the defendant's time had expired, or have required him to proceed by pleading, as he had threatened—and afterwards taken judgment for their costs, in the ordinary way after a plea to the further maintenance (b).

The day after the dismissal of the motion last mentioned, the attorney obtained an appointment from the Prothonotary, as of course, to tax the costs of it, and of his own order; the two exceeding twenty-six pounds.

(a) 22 L. J. Ex. 138.

(b) On this application the Court (*Stephen, C. J., Cheeke, J., and Faucett, J.*) laid down the rule broadly, that where no principle or very large sum is involved, and the question of costs is within the Judge's discretion, it will not entertain a motion for reviewing his decision as to costs, although it be clear that such discretion was wrongly exercised.

On attending this appointment, however, he was met by two objections—the validity of which we have now to consider. The first was, that the only order in fact made by the Judge was a conditional one; and that, as it had been formally rejected, and thereby in effect abandoned, no costs were due under it. The second was, that the plaintiffs' attorneys had that morning signed judgment against the defendant, he having (as was alleged) allowed his time to expire, for want of a plea; and so, they claimed their costs of the action—to be deducted, on taxation, from the costs under his rule dismissing the appeal. The Prothonotary having sustained these objections, the defendant's attorney applied in chambers to set aside that judgment, and succeeded. The plaintiffs then appealed against this last order to the Court; and now, with all the facts fully before us, we have to determine what shall be done.

1866.

FANNING
and another
v.
SIMMONS.

As to the nature and effect of the first drawn order, I have nothing to add to what has been said by me already. But, as it is alleged as a fact by Mr. *Levy*, and was maintained by his counsel, that the Judge's order on the terms stated never was abandoned, or that the attorney had no notice of its abandonment, I refer to the letter of the 17th August, already mentioned by me. If that contained no such intimation, I am at a loss to understand what it did contain. It is sworn, in addition, that there was a similar intimation by the plaintiffs' counsel, immediately on the order being pronounced; and Mr. *Levy* himself admits (affidavit of 14th September) that notice was then given of an intention to appeal. Surely, that alone was in substance an abandonment. Any words, by the party obtaining an order, unequivocally indicating to his adversary that it will not be acted on, are sufficient; and here, who could doubt that such was the plaintiffs' intention?

That disposes of the first point adverted to. On the second, also, it appears to me that the Prothonotary was right, and the judgment perfectly regular. The defendant's attorney, it is clear, thought himself protected by his secondly drawn order, which stayed all proceed-

1866.

FANNING
and another
v.
SIMMONS.

ings on both sides ; and hence his omission to take the step necessary to secure himself. The moment that he received the announcement of the 17th August, he was in a position to plead. For, I may ask, what then restrained the defendant? The plaintiffs could not hold their opponent to an order by which they themselves declined to be bound. The defendant's proceedings were stayed only on conditions which they rejected. The plaintiffs could not complain, therefore, had the defendant availed himself of his freedom. But pleading, although threatened, was not his object. What he wanted was *costs* ; and to secure these the attorney drew the second order, restraining the plaintiffs' proceedings as well as his own. If then that order fails him, he being unquestionably long out of time for pleading, the plaintiffs' attorneys had a right to step in—so soon as their own appealing motion to the Court was disposed of—and sign the judgment which they have signed.

It was urged that the plaintiffs, by giving notice of that motion, practically enlarged the defendant's time. Not at all. What possible effect could that have on the defendant? It might, as a matter of good faith, restrain the *plaintiffs* from taking any step ; but how could such a notice affect their adversary? Up to the 16th August, and perhaps three days beyond it, or beyond the 17th, the defendant's time continued running. But after that (unless protected by his secondly drawn order, which in my opinion is a nullity for reasons already given,) he was in default.

My conclusion on the whole matter clearly is, that this defendant (or rather his attorney, for to him all this litigation is owing,) has been wrong throughout these proceedings ; and especially in drawing up and attempting to act on the secondly signed order of the 16th August ; and that, on the other hand, except in their application to the Court on the 11th September, the plaintiffs have been right. I am therefore of opinion that the judgment by default signed on the 13th September should be sustained, and the order setting the same aside be rescinded, with costs, and the costs of this

motion; the defendant to get the costs of the motion, and rule thereon, of the 11th September, but not any costs, as already intimated, under the conditional order of the 16th August. And this result, all the circumstances being considered, will meet, as far as may be, the substantial justice of the case. It will at least prevent this defendant, who (it is sworn) never had any defence on the merits, from nevertheless throwing the costs of the suit on his opponents, as a reward for the offer to forego all their own.

1866.

 FANNING
 and another
 v.
 SIMMONS.

HARGRAVE, J. The motion of appeal now before the Court has only two objects, viz., first, to reverse my order of the 18th of September last, setting aside the judgment by default for want of a plea, signed by the plaintiffs on the 18th of September last; and, secondly, to obtain a declaration by this Court that my order of the 16th August was issued improvidently, the plaintiffs having already taken out and served the draft of that order.

With regard to the first point, viz., the regularity of the judgment by default, signed by the plaintiff on the 18th September, I am of the same opinion that I was in Chambers, viz., that inasmuch as it is quite obvious to my mind that under the order of the 16th August (whether the plaintiffs' or defendant's form of that order be correct), time to plead could not run against the defendant, because that order undoubtedly restrained all further proceedings on the part of the defendant; and, therefore, that order could not deprive the defendant of his time to plead, nor in any other way operate to his prejudice for not proceeding.

But, then, it has been argued that, my order staying proceedings by the defendant being conditional on the plaintiffs' payment of £4 4s., and the plaintiffs now stating that they abandoned that order *ab initio* directly it was made, it follows that the defendant might have pleaded *instantly*, and time would therefore run against him for not so doing. I think, however, first, that as no time was limited for payment of the £4 4s., the plaintiffs

1866.
FANNING -
and another
v.
SIMMONS.

could not have the benefit of such power, and yet time to plead run against the defendant.

And, secondly, I am of opinion that upon the facts there was no clear abandonment by the plaintiffs of my conditional order in their favor until after their appeal against that order had been dismissed with costs by the full Court on the 11th September, and that it was not until the 14th day after Mr. *M'Carthy* had filed his judgment for want of a plea, on the 18th September, that he then unequivocally stated to Mr. *Levy* that he had abandoned the conditional order.

Under all the circumstances of this case, I am of opinion that if ever the phrase "snapping a judgment" could be fairly applicable, it is most assuredly applicable to the present case; for it is obvious that Mr. *Levy's* hands were tied from the date of my order of the 16th August; that Mr. *M'Carthy's* form of that order, no less than Mr. *Levy's*, clearly stayed all proceedings by the defendant; and that it would be most unjust to allow judgment by default to be signed against any defendant when he had any reasonable ground for thinking he could not proceed.

In the present case, I am also quite sure that if Mr. *Levy* had filed a plea either on the 17th or at the close of the argument on the 16th, or if Mr. *Levy* had pleaded at any time pending the appeal against my order, Mr. *M'Carthy* would have moved before me to take such plea off the file; a motion which I should most assuredly have granted as readily as I granted the motion to set aside the judgment now under consideration, and on the same grounds. Lastly, it is obvious to my mind that, pending Mr. *M'Carthy's* appeal against my order, he had two strings to his bow, viz., first, the reversal or variation of my order; and, secondly, the payment at any time of the £4 4s.

I think, therefore, that upon every ground of proper practice Mr. *Levy* was quite justified in obeying the order to tax his proceedings, and that the judgment signed by Mr. *M'Carthy* for default was properly set aside by me under the circumstances.

With regard to the second object of this appeal, viz., to obtain a declaration of this Court as to the two different forms of my order of the 16th August ; the one taken out by Mr. *M'Carthy*, and the other subsequently by Mr. *Levy*, each embodying each party's version of my order as entered in my book at the time,—it seems to me that both these orders are erroneous ; for I certainly intended to give Mr. *Levy* his costs of that order absolutely, while Mr. *M'Carthy* has made the payment of such costs optional on his part, like the £4 4s., which would be a most absurd and unjust order; while, on the other hand, Mr. *Levy's* order is wrong in making the stay of proceedings extend to both parties, and unconditional in its terms. It is due also to Mr. *Levy* for me to state that he informed me at the time when he applied for the order, as indeed I also was myself well aware before, that Mr. *M'Carthy* had already taken out his version of my order. Consequently, whatever irregularity, if any, exists in my having issued a second order before the first was reversed, such second order was an error (if at all) in me as Judge ; and that Mr. *Levy* cannot be in any degree censurable for such second order, the more especially as Mr. *M'Carthy* now strenuously argues that he had already abandoned that order as first drawn up.

Lastly, with regard to the various other points of practice incidentally mentioned in this case, I do not see any ground for entering upon all such previous proceedings upon the present motion of appeal ; firstly, because I consider that the unanimous judgment of the Chief Justice, Mr. Justice *Cheeke*, and Mr. Justice *Faucett*, on the 11th day of September (dismissing, with costs, plaintiff's application to rescind or vary my order of the 16th August), has precluded both the parties, and this Court also, from now re-opening or discussing those proceedings so far as they are anterior to the 11th September ; and, secondly, because it would be quite impossible for me, in this judgment, to give my judicial opinion on all those collateral points in this complicated litigation without extending my present remarks beyond all reasonable limits.

1866.

FANNING
and another
v.
SIMMONS.

1866.

FANNING
and another
v.
SIMMONS.

CHEEKE, J. The material question for the consideration of the Court is with reference to the last paragraph in the judgment of the Chief Justice, in which paragraph I concur.

The conduct of the attorney of the defendant, in drawing up the second order and obtaining the signature of the Judge, after the express intimation he had received from the plaintiffs' attorney that the order had been taken out by him, and of his intention to appeal therefrom, was, in my opinion, to say the least, highly reprehensible.

June 19.

Ex parte MCKAY (a).

The 6th section of the Wagga Wagga Bridge Company's Act empowered the company to receive the tolls for the use thereof. The 21st section provides that "if any person pass through any toll-gate at or upon the said bridge without paying the legal toll to which he is liable, or shall fraudulently evade or do any act whatever in order or with intent to evade the payment of such toll," he shall be liable to a penalty. The 26th section enacts that the company shall have the absolute and exclusive right of ferry over the river Murrumbidgee for the full and clear distance of two miles on each side of the said bridge up and down the said river, and every person establishing for hire or profit any ferry shall be liable to a penalty. *Held*, that the company is not entitled to receive toll in respect of animals crossing the river within two miles of their bridge, but not over it, nor is such crossing the river an evasion of payment of the toll under the 21st section.

STEPHEN moved to make absolute a rule for a prohibition to restrain certain justices of the peace and the prosecutor, *Tompson*, from further proceeding upon a certain conviction. The applicant, *McKay*, was the collector of tolls on behalf of the Wagga Wagga Bridge Company. The respondent, *Tompson*, was the poundkeeper at Wagga Wagga. On the 2nd April *Tompson* crossed twenty-four head of horses over the Murrumbidgee river, about a mile and a quarter to the westward of the bridge. On the 14th April the applicant, *McKay*, demanded and received from *Tompson* £1 4s. as the toll payable for the said horses. On the 17th April, upon the information of *Tompson*, *McKay* was convicted of taking a toll that he was not authorised to take and fined. It is submitted that this conviction is wrong. The 6th section of the Wagga Wagga Bridge Company's Act enacts that the company may make a bridge over the Murrumbidgee, "and upon the

(a) Before *Stephen*, C. J., *Checke*, J., and *Faucett*, J.

completion of the said bridge receive and take the tolls for the use thereof." The 21st section provides that "if any person shall pass through the toll-gate at or upon the said bridge without paying the legal toll to which he is liable, or shall fraudulently or forcibly evade or do any act whatever in order or with intent to evade the payment of such toll, and whereby the same shall be evaded," he shall be liable to a penalty. By the 26th section "the said company shall have as against all persons, except the Crown, the absolute and exclusive right of ferry over and across the said river Murrumbidgee for the full and clear distance of two miles on each side of the said bridge up and down the said river; and every person establishing or attempting to establish for hire or profit any ferry over and across the said river within that distance" is liable to a penalty. The horses passed within two miles of the bridge, and were therefore liable to pay toll, and as it is clear that they were driven across the bed of the river with the intention of evading the toll, the collector was justified in demanding the toll, and the conviction is therefore wrong. He referred to *Veitch v. Trustees of Exeter Turnpike road* (a).

1866.

Ex parte
McKAY.

Windeyer showed cause. The powers of the company are contained in the 26th section, which only prohibits the establishing a ferry for hire. [*Stephen, C. J.* A person can only evade a toll to which he is liable.]

STEPHEN, C. J. If a man can cross the river, either above or below the bridge, there is nothing in the Act which compels him to use it. Taxation cannot be imposed without clear words; but if the Act imposes the liability contended for, it would impose taxation, for it would compel persons who had received no benefit to pay money.

It is necessary to see that *Tompson* intended to evade the payment of toll to which he was liable. The words of the section are, "do any act whatever in order or

(a) 27 L. J. M. C. 116.

1866.

Ex parte
McKAY.

with intent to evade the payment of *such* toll"—that is, the toll to be collected "at or upon the bridge," which is the only toll the company are entitled to demand. I give no opinion whether the company have a right of action against a person for evading the payment of the toll.

CHEEKE, J., and FAUCETT, J., concurred.

Rule discharged.

BROWN and another *against* WARATAH COAL COMPANY.

In a contract to deliver coals on board a vessel there is an implied contract to deliver the same with care, but it is no portion of that contract to distribute them when delivered on board.

THIS was an action for negligence and want of care in the delivery of a cargo of coals on board a vessel of the plaintiffs. The declaration alleged an agreement between the plaintiffs and the defendants, that the latter should sell to the plaintiffs certain coals, "upon the terms that the defendants should deliver the same on board a certain vessel of the plaintiffs, and should use due care in and about the said delivery. Breach, that the defendants did not use due and proper care in and about the delivery of the said coals, but, on the contrary, so negligently delivered the same that the said vessel of the plaintiffs, by the defendants want of care and negligence of the defendants, sank, and was wholly lost to the plaintiffs."

Pleas (1), not guilty; (2) a denial of the agreement to deliver, &c.; (3) that the defendants used due care in and about the delivery, &c.; (4) that the vessel was insufficient for the purpose of receiving the coals, as the plaintiffs well knew, and that the damage arose from the insufficiency of the vessel, and not through defendants want of care, &c. Issue thereon.

At the trial, before *Cheeke*, J., at the Maitland Circuit, in October, 1865, it appeared that the plaintiffs were partners and owners of a barge called the "Minmi;" and that they had agreed with the defendants for the purchase of 150 to 200 tons of coals.

The evidence of one of the plaintiff's as to the contract was as follows:—"There was no contract in writing as to the delivery of the coals; it was at 2s. 3d. a ton. The coals were to be put on board at the company's (defendant's) shoot. I stated that the men could take as much as they thought she could take. The 'Minmi' was to be sent up. *Russell* was under the superintendence of the company's manager."

1866.
BROWN
and another
v.
WARATAH
COAL
COMPANY.

It appeared that one *Russell* had contracted with the defendants by a written agreement to do all the labour of conducting the delivery of the coals at a certain price per ton. The evidence then showed that the defendants took up the barge and placed her under the shoot, but there being some delay in the delivery they hauled her into the stream, and left her anchored there. While they were absent at Newcastle obtaining provisions, the coals having arrived at the shoot from the mine, the contractor, *Russell*, or his servants, brought the barge from where she had been left anchored and put her under the shoot, and shot the coals into her, nobody being on board to distribute the coals equally over her keel. She thereupon "canted" over and became in a sinking state. The plaintiffs, hearing of her condition, hauled her from under the shoot and grounded her on a sand bank. They then gave notice to the defendants that unless they raised the barge that they should consider it as abandoned by them, and cause it to be sold for the benefit of those whom it might concern, and hold the defendants liable for the difference between the price realised and its value. The defendants taking no notice of this letter, the plaintiffs caused the barge to be sold by auction. The learned Judge ruled that the action was in contract and not in tort; and the jury having found for the plaintiffs with damages, £1,200, being the difference between the value of the barge and price obtained for her by auction,

Isaacs now obtained a rule *nisi* for a new trial, on the ground that the act of loading, or negligence complained of, was not the act of the defendants or their

November 29,
1865.

1866.
BROWN
and another
v.
WARATAH
COAL
COMPANY.

agent, and that *Russell*, who directed that act, was a contractor with the defendants, and not for the purposes complained of the agent of the defendants (a). He also asked for a rule on the ground that the Judge ruled wrongly that the action was in contract. But the Court refused a rule on that ground, saying that it was unnecessary to decide whether it was in contract; because, assuming that it was an action of tort, it would directly arise out of contract, and therefore the defendants' liability would depend on whether they ever made the contract.

September 10,
1866.

Sir *W. Manning*, Q. C., and *Stephen* showed cause (b).

The *Attorney-General* and *Solicitor-General* (*Norton* with them) for the defendants, contra. No such contract as that declared on was ever made (c). The defendants did not undertake to distribute the coals, but to deliver them. By this contract there were to be persons ready to receive them, and the defendants contract was at an end when the coals were under the control of such persons. "The liability," says *Rolfe*, B., in *Reedie v. The London and North-Western R. Co.* (d), "of any one other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or want of care of the person employed; but

(a) A rule was obtained on other grounds, but the judgment of the Court renders any further reference to them unnecessary.

(b) The arguments used are omitted as no decision was given on the points thus argued.

(c) There was a dispute as to whether this point was taken on the motion for a rule *nisi*; and, if so, whether, nevertheless, it was substantially included in the rule as drawn up. The Court, however, allowed the point to be argued on condition that Sir *W. Manning* should be allowed finally to reply on it, the latter not having supposed that the point was taken, and the Court not recollecting whether it was; and the *Solicitor-General* (*Isaacs*) asserting that he did take and unquestionably meant to take the point.

(d) 4 Exch. 255.

neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." In a very recent case, *Murphy v. Caralli (a)*, it appeared that some bales of cotton sent by the defendant to a warehouse, and packed there carelessly by his servants under the direction of the warehouse keeper, afterwards fell on the plaintiff, a servant of the owner of the warehouse who was passing by in the course of his duty, and the defendant was held not to be responsible. The ground of the judgment is that the act complained of must be taken to have been done under the direction of the warehouse keeper. The authority of *Randelson v. Murray (b)* is questioned, if not overruled. [Stephen, C. J. In no case of that kind is there a contract with the person injured.] There is no pretence that there was an express contract to deliver these coals with care. There is no authority for the existence of any such implied contract. [Stephen, C. J. If I contract with *B.* to deliver a cask of wine on my cart, does not *B.* impliedly contract that he will not injure my cart?] If *B.* injured the cart he might be liable in tort. An injury done in the performing of a contract is a tort, but not a violation of the contract. According to the plaintiff himself, there was a contract for one lot—for the purchase and sale of "from 100 to 200 tons," to be delivered at the defendants' wharf on board the plaintiffs' vessel or vessels, "to be put on board at the company's shoot." And one of the plaintiffs told the defendants that his men would take on board the vessel as much as they thought she could carry. There could have been no such contract as that alleged. The vendor of goods contracting to deliver them into the vendee's barge, or cart, or cellar, cannot be held impliedly to contract with the vendee that he will use skill and care in so delivering. There may be a general duty to that effect, but it does not spring out of contract, and the "duty" was imposed here on *Russell* and

1866.
BROWN
and another
v.
WARATAH
COAL
COMPANY.

(a) 3 H. & C. 462; 32 L. J. Ex. 14. (b) 8 A. & E. 109.

1866.

BROWN
and another
v.
WARATAH
COAL
COMPANY.

his men and not on the defendants; it was neither the defendants' contract nor their duty to shift the barge to and fro for receiving the coals properly into her and stowing them properly away. It was the duty of the plaintiffs' men in charge of the barge, as they admitted at the trial. The impropriety was this, that *Russell's* men put the coals on board in the absence of those men. For this he alone is responsible. The contract was to deliver when the barge was brought to the shoot by the plaintiffs. She never was so brought, owing to the misconduct of *Russell* in placing her there—but for this the defendants are not answerable. It is clear that the plaintiffs had no right to abandon the barge, and still less to sell her, and then obtain the difference of price on a forced, if not collusive, sale.

Sir *W. Manning* (*Stephen* with him) in reply. The point now relied on was not taken on the motion for a new trial, and so ought not now to be argued. It was admitted by the shipping manager of the company that it was part of his duty to load the vessel properly. [*Stephen*, C. J. But was it his duty to distribute the coals when shot into the ship?] The contractor *Russell* was under the superintendence of the company's manager, and the acts of *Russell* were recognised by the defendants.

STEPHEN, C. J. I am of opinion that there must be a nonsuit. I shall assume that the contract alleged was rightly made, and that it was within the scope of the authority of those who made this contract to make this implied contract. It seems to me (assuming the contract to deliver to have been effectually made, so as to bind the company), that an implied contract did arise to deliver with due care. But it was no portion of that contract to distribute the coals when delivered. If, in the act itself of delivery (as, for example, by shooting the coals down on to a mast, or skylight, or on to the edge of the vessel, or on the deck, instead of into the hold), mischief was done, the company would, I think, have been answerable. Here, however, it was caused

by the absence of the crew, and their omission consequently to distribute the coals when delivered. It is clear from all the evidence that the crew were there (up to that time) for that very purpose; and that, had the coals after delivery been dispersed over the vessel, the accident would not have occurred. It is clear to my mind that the whole of the damage arose from the tortious act of the shipping contractor *Russell*, in bringing up the barge in the absence of her crew, and then not providing men to do their duty.

It is unquestionable that if no implied contract arose on the part of the company to deliver with care the action must fail. Firstly, because the act of shooting the coals on board was that of *Russell*, or his men, over whom the company had no control at the time. So that it was a breach of "duty," merely, in him or them—in other words, a *tort*; for which as such the company is not responsible. Secondly, because, if a *tort* (and assuming the company to have been liable for it), *tort* is not charged against them.

I may add that, in my opinion, the plaintiffs could only have been entitled to recover the damage actually done. They seem to have considered themselves insurers, and so to have abandoned the vessel. But it is clear that the only real damage was the costs involved in getting her up and her diminished value by reason of the accident.

HARGRAVE, J. The question is whether on these pleadings and on this evidence the defendants are liable. A distinction must be drawn between those acts which constitute the delivery and those acts which are collateral to the delivery. I am of opinion that, as soon as the coals touched the ship, the delivery was complete. The liability of the defendants must not be extended beyond this, and they are not responsible therefore for the neglect to trim the coals, or to shift the vessel when required.

CHEEKE, J., concurred.

1866.

BROWN
and another
v.
WARATAH
COAL
COMPANY.

1866.

BROWN
and another
v.
WARATAH
COAL
COMPANY.

Per curiam. We think that the justice of the case requires that the nonsuit should be without costs. We grant a new trial therefore, unless the defendants will take a nonsuit without costs.

Costs of this motion to the defendants (a).

In re BUCKLAND'S Insolvent Estate (b).

A. being sued upon an administration bond executed by him under the 4 G. IV., c. 96, s. 15, sequestrated his estate. The sequestration took place after action brought, and before judgment obtained; but no notice of the action was given to the official assignee of A.'s estate, nor was he "summoned to take up and defend the action" under section 31 of the Insolvent Act. The action went on, and judgment was obtained as on a bond to the Crown. An application having been made in the name of the Attorney-General, the nominal plaintiff in the action, to prove in the estate for the full amount of the judgment was refused by the Chief Commissioner. *Held*, on appeal, that such refusal was right.

THIS was an appeal from the Chief Commissioner of Insolvent Estates, rejecting the proof of a debt alleged to be due by the said insolvent to the Attorney-General, on behalf of her Majesty, &c. It appeared that the alleged debt arose upon a surety bond, dated September, 1860, and given by the said insolvent, jointly with other persons, to her Majesty, to secure the due administration of the estate of one *Thomas Rhodes*, late of Sydney, deceased, an action upon which bond was commenced on 27th September, 1865, and judgment recovered on February 15th, 1866, for the sum of £548 17s. 1d.; the sequestration of the insolvent's estate having taken place on the 5th January, 1866.

The defendant sought to prove in the estate on the foot of the judgment so obtained.

It was contended on the one hand that the plaintiff not having proceeded under the Insolvent Act, 5 Vic., No. 17, s. 31, could not prove. And on the other that this was a Crown debt; and that the Crown was not bound to pursue the provisions of the Insolvent Act, although it might come in under it.

The following authorities were referred to:—*Archbishop of Canterbury v. Robertson* (c), *R. v. Peto* (d), *R. v. Bayley* (e), *In re Ibbotson—Bryant's Insolvency* (f)—

(a) See *Noble v. Ward*; New Reports, Ex. 117.

(b) Before *Hargrave, J., Cheeke, J., and Faucett, J.*

(c) 1 Cr. & M. 713.

(d) 1 Y. & Jer. 48.

(e) 4 Ir. Eq. R. 142.

(f) 22nd August, 1847.

Charter of Justice, ss. 14, 15, 16, cited in Steph. Sup. Ct. Pr. 16; 1 Wms. on Executors 350, 463, 468; 9 Rep. 39; 2 Bl. Com. 485, 494; 1 Bac. Ab. 635; 3 Buc. Ab. 457, 464; *Broom's Max.* 62, 72; 7 Vin. Ab. 104; Sm. Merc. Law 659.

1866.
In re
BUCKLAND'S
Insolvent
Estate.

Cur. adv. vult.

Their Honors delivered judgment as follows :—

November 20.

HARGRAVE, J. After stating the facts as above, continued: The only question for our consideration on this appeal was whether the usual administration bond constitutes a debt due to the Crown, so as to entitle the parties beneficially entitled to the estate administered (who alone under sect. 16 of our Charter of Justice can be allowed to put the bond in suit), to the benefit of the maxim that the Crown is not bound by statutes unless named therein.

The case of *Ex parte Usher (a)*, and other authorities, are clear decisions in support of the distinction between debts actually due to the Crown and those in which the Crown is a mere "royal trustee," or even less than a trustee.

But the Privy Council case of *Wildes v. The Attorney General of Trinidad (b)*, is, in my opinion, the decision most applicable to the present case, although not cited during the argument; and of course of the highest authority. In that case it appeared that the Colonial Court of Trinidad had decided in favour of a preferential claim made by the Crown against a mortgaged estate for moneys due by the Treasurer of that colony, under a bond to her Majesty, in respect of deposits received and held by him in his official capacity, though received from the Escribanos or Registrars of the local Court. The matter coming by appeal before the Privy Council, Mr. Baron Parke, on behalf of their Lordships, distinctly limits the prerogative of "Crown debts to debts due from the Crown to private persons, or debts due to the Crown from Government officers in their public capacity, and

(a) 1 Ball & Beat. 197, 199.

(b) 3 Moore's P. C. R. 200.

1866.

In re
BUCKLAND'S
Insolvent
Estate.

which form a part of the public revenue." His Lordship's words are:—"We think it is impossible to say that these deposits either constituted a debt from the Crown to the individual suitors, or a debt from the Treasurer to the Crown as a parcel of the public revenue," and, therefore, such debt could have no priority.

Now, applying this high authority to the present case, it appears plain to me that the usual administration bond, though in form payable to her Majesty, her heirs, and successors, as in the *Trinidad* case, does not thereby create or constitute *in se* a debt from the Crown to the parties beneficially interested; and it is equally obvious that it does not create or constitute a debt to the Crown from the public officers as a parcel of the public revenue.

Nor do I think that the case of *Queen v. Bayley (a)*, before Lord *St. Leonards*, can be held to throw any doubt upon this distinction of Crown debts, for that learned Judge, at the close of his judgment, expressly recognises this distinction, on the authority of *Ex parte Usher*, and other cases; and his Lordship decided in favour of the Crown in that particular case then before him, upon the words of the particular statute then under consideration, and without in the least impugning the distinction contended for. The words of Lord *St. Leonards* are:—"In all the cases the Court distinguishes the real debts of the Crown, and those which are only securities for the benefit of private persons."

It being therefore clear that this is not a Crown debt in any prerogative sense, it follows that this claim against the insolvent's estate must be subjected to all the legislation as to "debts," "debtor," and "creditor," as used in their ordinary sense throughout the 31st and 36th section of 5 Vic., No. 17, and elsewhere in the Insolvent Act. Consequently the decision of the learned Chief Commissioner was, in my opinion, perfectly correct. This appeal will, therefore, be dismissed with costs.

(a) 1 Dru. & War. ; 4 Ir. Eq., R. 142.

CHEEKE, J. I concur in the judgment of Mr. Justice Hargrave, that the decision of the Chief Commissioner be confirmed.

1866.

In re
BUCKLAND'S
Insolvent
Estate.

I consider the case of *Wildes v. Attorney General of Trinidad* (a) decisive of the point, that "where there is a *preference* due to the Crown, it is only for debts due to the Crown from the Treasurer, in his public capacity, and which form a part of the public revenue debts due to the exchequer of the Crown." Again, in *Regina v. Bayley* (b), the Lord Chancellor says, "In all cases I have seen the point distinguished between the real debts of the Crown and those which were only securities for the benefit of private persons."

FAUCETT, J. In this case the insolvent had become liable under an administration bond entered into by him in pursuance of the 15th section of 4 G. IV., c. 96, and the bond was put in suit in pursuance of the terms of the 16th section of that Act. The sequestration took place after the suit had been commenced, and before judgment had been obtained; but no notice was given to the official assignee, nor was he "summoned to take up and defend the action;" and the action went on, and judgment was obtained as on a bond to the Crown, and as if no sequestration had taken place.

An application was then made, in the name of the Attorney-General, the nominal plaintiff in the action, to prove in the estate for the full amount of the judgment, and such proof the Chief Commissioner refused to allow. That decision is now appealed against.

It is contended, in substance, on the part of the appellant, that, this being a Crown debt, the Crown, although not bound by the Insolvent Act, is entitled, if it chooses, to take advantage of it and prove in the estate for the full amount of the judgment, without showing to what extent the person who is really interested and who is really moving in the matter has sustained damage.

Now, assuming that this is a Crown debt, and not questioning the proposition that the Crown, although

(a) 3 Moore P. C. R. 200.

(b) 1 Dru. & War. 216.

1866.

In re
BUCKLAND'S
Insolvent
Estate.

not bound by a statute, may take advantage of it, I am of opinion, that, when the Crown does choose to take advantage of a statute by which it is not bound, it must, in doing so, bring itself within the terms of the statute and follow its provisions.

Under what section, then, of the Insolvent Act does the Crown now proceed? What provision is there in that Act that will authorise the present claim?

The 30th section prescribes the course to be pursued in respect of a judgment recovered before the sequestration. In such a case the judgment creditor may prove against the estate for the amount of the judgment.

The 31st section prescribes the course to be pursued when the order for sequestration has been made after the commencement of an action, but before judgment has been obtained. In such case the official assignee must be "summoned to take up and defend the action"—a provision that is manifestly a reasonable one, and for the protection of the creditors. For, as the order for sequestration has, by the 53rd section, the effect of divesting the insolvent of his whole estate, he has no further interest in defending the action; nor, indeed, can he be supposed to have the means of doing so. The official assignee alone, in whom the estate rests, has an interest, as representing all the creditors, in considering whether an action ought to be further defended or not. Now the Crown was in a position to avail itself of the provisions of this section, but it has not done so.

These are the only sections that contemplate the admission of proof of a judgment debt. There is no section which provides for the admission of proof of a debt upon judgment recovered after the order for sequestration has been made, when the official assignee has not had notice of the action. To allow the Crown to prove upon a judgment recovered under such circumstances, would, in my opinion, be introducing into the Act, in favour of the Crown, a provision which does not exist. It would, in fact, be enabling the Crown to prove for a debt which had accrued subsequently to the sequestration. On this ground, therefore (which may

be considered a technical one), I am of opinion that the decision of the Chief Commissioner was right.

Besides, I think it is very questionable whether the proposition that the Crown is not bound by the Insolvent Act, when expressed thus broadly, is correct in its full extent. If it means (as would appear to have been contended for on behalf of the appellant) that if the Crown should obtain a judgment against an insolvent, after the sequestration of his estate, it may treat the transfer of the estate effected by the Insolvent Act as a nullity, I doubt very much whether the proposition can be supported to that extent. On the contrary, I am disposed to think that the order for sequestration has the same effect against the Crown that an actual assignment after a commission had under the old English Bankruptcy Law, according to which the transfer of property was valid against an extent issued by the Crown, subsequently to the assignment (a). But at present it is unnecessary to decide this point for the reasons already given.

A further question, however, of considerable importance, has been raised, viz., whether the debt in this case is of such a nature that the prerogative of the Crown will attach to it in the manner claimed.

Now, it is quite clear that under the 16th section of 4 G. IV., c. 96, the bond can be put in suit only by order of the Court, and for the benefit of such person or persons as shall appear to the Court to be interested therein. Now, such persons cannot be interested to the full extent of the bond, unless damage to that extent has been sustained. But if the contention on the part of the appellant be correct, the person interested might have sustained damage to a trifling amount, and, if allowed to prove for the entire amount of the bond, might obtain a dividend far exceeding the entire damage sustained. Surely it is the duty of the Court to see that such an injustice shall not be committed. The Court, which alone has power under the statute to

1866.

In re
BUCKLAND'S
Insolvent
Estate.

(a) See 1 Bac. Abr. 735, Bankruptcy (H.), and *Austen v. Whitehead*, 6 T. R. 436.

1866.

In re
BUCKLAND'S
Insolvent
Estate.

allow a person to use the name of the Attorney-General, is bound, before doing so, to see that such person is interested; and I am of opinion, that, by necessary implication, it is also bound to see that the authority so given is not abused, but shall be exercised only to the extent to which such person is so interested, that is, to the extent to which he has sustained damage. I am, therefore, of opinion that the person interested (who is really the party moving in this matter, and who moves solely for his own benefit,) is not entitled to claim the benefit of the bond to its full amount, unless he shows that he has sustained damage to that amount; and, accordingly, that in the present proceeding he is not entitled to the prerogative right which he claims.

In *Ex parte Usher* (a), the Lord Chancellor draws a distinction between a "debt subsequently due to the Crown" and a debt arising under a security somewhat similar to that now in question. The Lord Chancellor there says: "It certainly does not appear to me to be a debt due to the Crown, nor such as to warrant a Baron of the Exchequer to grant a fiat for the purpose of an extent issuing; for it is not a public debt, in which case alone the Crown process issues. And I think that the form of the security does not alter the nature of the debt in this respect."

In *Rex v. Eyres* (b), in the case of a forfeited recognizance, Lord Mansfield said: "The King has no interest in this money; he is only royal trustee for the party."

And in *St. John's College v. Murcott* (c), a similar distinction is taken between a suit for the benefit of the Crown, and a suit in the name of the Crown for the benefit of the party.

The case of the *Queen v. Bayley* (d) has been relied upon as showing that no such distinction in reality exists. But that case is manifestly decided in reference to a particular statute. And when the Lord Chancellor there says, "I do not think that there is any distinction

(a) Ball & Beat. 197. (b) 4 Burr. 2119.

(c) 7 T. R. 259. (d) 1 Dru. & War. 224; 4 Ir. Eq. R. 142.

in this respect between cases in which the Crown is beneficially interested, and those in which, as it is said, the Crown is but a 'Royal trustee;' " that expression must be taken in reference to the case and the statute then under consideration. And in a later part of this judgment, the Lord Chancellor distinctly refrains from expressing any opinion on the cases referred to, but merely says that they had no bearing on the case then before him. At the conclusion of his judgment the Lord Chancellor says:—"No difficulty can arise in practice from this decision, because the Court never permits a recognisance to be put in suit without its leave, and that leave would not be granted when the enforcing of the recognisance would be contrary to equity. Upon such an application the Court would consider the equities affecting the parties; but the present case came before me to decide, not according to equity or good conscience, but according to the strict rules of law."

1866.

In re
BUCKLAND'S
Insolvent
Estate.

Now, these observations appear to me to be in every respect applicable to the present case. For, whether there is or is not such a distinction as has been mentioned between debts due to the Crown, in which it is beneficially interested, and debts nominally due to the Crown, in which it has no interest; and whether there is or is not any difference in the mode of procedure in such cases, I am of opinion, in the first place, that the present claim is clearly inequitable, and that the Court, looking at the equities affecting the parties ought not to allow it; and in the next place, I am of opinion, considering the terms of the 16th section of 4 G. IV., c. 96, and the provisions of the Insolvent Act, that in strict law the claim cannot be supported.

The case of *In re Ibbotson*, in the estate of *Bryant*, decided in this Court on 23rd July, 1847, has been referred to. That case decides that the Chief Commissioner has no power to permit a judgment of the Supreme Court to be impeached, unless fraud or something tantamount thereto were positively alleged. Now the present decision appears to me to be entirely in

1866.

In re
BUCKLAND'S
Insolvent
Estate.

accordance with that decision, as the circumstances under which the judgment in the present case was obtained are shown; and they are, in my opinion, as I have already said, such as require that the damage really sustained by the person interested should be examined into.

I am therefore of opinion that this appeal ought to be dismissed.

September 18.

CLARK *against* HART (a):

A *feme covert*, who has obtained a Judge's order protecting personal property acquired by her after desertion, under the 22 Vic., No. 6, s. 4, is entitled to sue in respect of personal property acquired by her after such order.

Secus in respect of personal property belonging to her husband, and left by him in her possession, and for which a demand had been made upon the defendant by the husband.

A PPEAL from the Metropolitan District Court.

This was a case of detainee brought by a married woman to recover certain goods valued at £51 14s. The defendant pleaded (1) coverture of the plaintiff; (2) non-detinet; (3) not possessed. Issue thereon.

At the trial, before Mr. District Court Judge *Dowling*, in November, 1865, the learned Judge gave a verdict for the plaintiff for the return of the goods, or £20 for their value, and one shilling for their detention. Some of these goods had been acquired by the plaintiff after she had obtained a Judge's order protecting her personal property acquired after desertion, under the Deserted Wives and Children's Act, 22 Vic., No. 6, s. 4. But with regard to some of these goods, the appeal case contained the following statement: "It was also proved that a great portion of the goods claimed were the property of the plaintiff's husband prior to the date of the said protecting order, and that they were not acquired by the plaintiff after the date of that order, although they were in her possession after the date of such order, she having obtained them from her husband before such order, and that they were left by her upon the premises of the defendant after the date of such order, in his charge." With regard to these latter goods, the learned District Court Judge was of opinion that the defendant could not set up the *jus tertii*.

(a) Before *Stephen*, C. J., *Checke*, J., and *Faucett*, J.

The *Solicitor General* for the appellant.

1866.

CLARK
v.
HART.

Stephen, who appeared for the respondent, was called on by the Court as to these latter goods. It is submitted that the plaintiff can make a bailment of these goods to another person; and that, therefore, if they are not re-delivered, she can maintain an action for the breach of contract, or of trover; and the defendant to whom they were delivered by the plaintiff cannot set up the right of a third person. Mere possession of goods is sufficient to maintain an action of trover against a wrongdoer, and he cannot set up the title of any one else; *Jeffries v. The Great Western R. C.* (a). If the defendant had taken these goods out of the plaintiff's possession, this is a distinct authority in her favour. [*Stephen*, C. J. The plaintiff is only a *feme sole* as regards goods acquired by her after the order.] The defendant has not given up these goods to the husband, nor does he allege that he is keeping them for the husband; *Bourne v. Fosbrooke* (b). In that case the plaintiff, when a young child, resided with her aunt in the house of the defendant's testator, where the aunt lived as housekeeper, and the plaintiff was almost adopted into the testator's family. The aunt was a married woman, living apart from her husband, who had deserted her; and previously to her death she gave the plaintiff some jewellery and apparel; part of these the plaintiff gave the testator to keep for her, and the rest she placed in her own boxes in the testator's house. Upon the aunt's death, her husband once called and claimed her effects; but the testator repudiated the husband's right, and the husband never afterwards claimed them or interfered further in the matter. When the testator died (which happened whilst the plaintiff was away at school), the defendant, as executor, took possession of the articles which had been so given to the plaintiff, and refused to restore them to her; and it was held that the plaintiff was in possession so as to be entitled to maintain an

(a) 25 L. J. Q. B. 106.

(b) 34 L. J. C. P. 164. See *R. v. Robson*, 31 L. J. M. C. 22.

1866.

CLARK
v.
HART.

action against the defendant for these articles; and it was not competent to the defendant to set up the right of the aunt's husband as an answer to the action. *Erle*, C.J., in delivering judgment, says: "We should have had great difficulty if the husband had come forward and demanded the goods, and the defendant had agreed to hold them on the husband's account, so as to have enabled the defendant to have come in under the husband. But, considering what the testator said when the husband came and claimed the articles, (which, though the testator was wrong in his law, is important as showing the terms on which he held such articles,) I see nothing to authorize the defendant in refusing to give them up to the plaintiff. He is not justified in setting up the right of the husband." But the defendant cannot refuse to deliver up goods merely on the ground that they have been claimed by the husband; and the plaintiff, therefore, is entitled to succeed on the issue of not possessed. There is nothing in this case equivalent to eviction by title paramount, as in *Beddle v. Bond* (a); and the defendant is estopped, therefore, from disputing the plaintiff's right to recover. The words of the section (b) under which this order was made are in the plaintiff's favour; for they protect her personal property, "and all contracts in reference to such personal property, and all other contracts entered into by her after the making of such order." *Mason v. Mitchell* (c), and *The Midland Railway Company v. Pye* (d), were referred to.

The *Solicitor-General*, for the appellant, in reply. It is admitted that the action will lie for property acquired after the making of the order. But the error here is that the learned Judge has not discriminated between the two classes of goods, and therefore there must be a new trial. It is clear that as to the husband's goods the plaintiff was her husband's agent, and that as his agent she left them in the defendant's house, and that therefore it was no case of bailment at all.

(a) 34 L. J. Q. B. 137.
(c) 34 L. J. Ex. 68.

(b) 22 Vic., No. 6, s. 4.
(d) 30 L. J. C. P. 314.

STEPHEN, C.J. I am of opinion, first, that the wife has clearly a right to sue in respect of such of the goods as had been acquired by her since the order. I think also that a wife could recover with respect to goods acquired by her after the order and deposited by her as bailor. But that with respect to such goods as were her husband's before the order, he having demanded them from the defendant, the wife had no longer any claim. It was not necessary for the defendant to give up the goods, for it must be assumed, after the demand, that he holds them for the husband. As to all such goods so demanded the plaintiff is not a *feme sole*, but a married woman.

1866.

CLARK
V.
HART.

Whether she could maintain an action like this in respect of goods belonging to her husband, and by him left in her possession, but not demanded by him from her or the bailee, we need not and do not determine.

The District Court Judge has thus decided rightly as to one part of the claim, and wrongly as to the other, and the case does not enable this Court to distinguish between the two. So that there must be a new trial. As a rule we give the costs to the successful appellant. But as here both parties succeed partially, and as the appellant ought to have restored to the plaintiff the goods acquired since the order, and is wrongfully disputing her entire claim, we think that the costs of the first trial ought to abide the event of the second, and the defendant, the appellant, must have the costs of this appeal (*a*).

The other Judges concurred.

Judgment for the appellant.

(*a*) See *Seaman v. Hargraves*, 1 Sup. Ct. R., C. L. 80; and *Macbean v. Taylor*, 4 Sup. Ct. R., C. L. 366.

1866.

September 14.

Ex parte MONSON (a).

A servant charged with unlawfully absconding from the hired service of his master without reasonable cause before the expiration of the term of his agreement, cannot be sentenced to imprisonment under the second section of the Masters and Servants Act.

On motions for prohibitions, affidavits of what occurred before the justices are not admissible to supplement the depositions, but they may be used for the purpose of shewing merits.

A party who has served a Judge's order on the other side with a notice that he intends to appeal, does not waive his right to move to rescind such order.

SIR W. Manning (*Stephen* with him) moved to make absolute a rule *nisi*, to rescind an order made by *Hargrave, J.*, in Chambers (b), and for a prohibition to restrain certain justices and one *Hindmarsh* from further proceeding in respect of a conviction, whereby the applicant *Monson* was sentenced to one month's imprisonment. It appeared by the affidavits that the applicant had hired as a general farm servant to *Hindmarsh*, under a written agreement dated August 17, 1866, for six months—the wages were to be at the rate of £30 per annum, with board and lodging, or hut room and certain specified rations. It was further agreed that *Monson* should receive “the reasonable travelling expenses to the place at which he is to be employed; it being understood that the said expenses be deducted from the wages, provided the agreement be not faithfully performed.” Wages to commence from the time of arrival. On the 18th August, *Monson* left Sydney for *Hindmarsh's* farm, at Kiama. On the morning of the 20th August, he told *Hindmarsh* that he could not remain, and asked permission to leave. Upon *Hindmarsh's* refusal, he left and went to Shoalhaven. On the same day *Hindmarsh* laid an information against *Monson*, for unlawfully absconding from his hired service; and on the 21st a warrant was issued for his apprehension. *Monson* was thereupon arrested and brought before the justices, who convicted him, and sentenced him to two months imprisonment. It is clear that the information was under section 2 (c); but that

(a) Before *Stephen, C. J., Hargrave, J., and Cheeke, J.*

(b) An application for a prohibition had been dismissed by *Hargrave, J.*, in Chambers, with costs.

(c) The second section enacts that “if any servant having entered into such service shall absent himself therefrom without reasonable cause, before the term of his contract shall have expired (whether such contract shall be in writing or not), shall forfeit, &c.” The third section enacts that if any servant after having entered into any contract, either

the conviction and punishment were under section 3. *Monson*, therefore, was sent to gaol for two months, for simply "absconding," which is utterly unauthorised by the statute. There was no allegation or evidence that he had received any "advance" whatever on account of his wages; nor that he refused to perform his work to the extent of his advance. Under the agreement the man was to receive his travelling expenses, which are to be "deducted from the wages, provided the agreement be not faithfully performed." But, in fact, there is no evidence that the travelling expenses were paid. [*Stephen*, C. J. On the depositions there is no evidence of an advance; the question therefore arises, how far the case, as it appears on the depositions, can be supplemented?]

1866.

Ex parte
MONSON.

Butler, for respondent, tendered an affidavit of the respondent *Hindmarsh* and the adjudicating justices, that he (*Hindmarsh*) had caused ten shillings to be paid for *Monson's* passage from Sydney to Kiama; and on the question of the reception of evidence to supplement the depositions, referred to *Parsons v. Brown* (a), and *Taylor on Evidence* (b).

Per Curiam. We refuse to allow any affidavit to supplement the evidence given before the magistrates. The case must stand or fall by that which appears on the record. There may be exceptions from this rule; but this is not a case of that kind. But we allow the appellant's affidavit, denying the receipt of any wages, to be used to show merits—*i.e.*, that he was not in fact within the third section. For the fact may determine the question of costs. And, similarly, we allow the master to use an affidavit (for this single purpose only—

written or parol, with any master to serve him for any time, or in any manner shall obtain from such master any advance of money or goods on account of wages, for which he shall have so contracted to serve, and shall, after obtaining the same, neglect or refuse forthwith to go to the place at which he shall have so contracted to serve, or shall refuse to perform the work he shall have so contracted to perform, to the extent of the advance of wages so made, without reasonable cause, such servant so offending shall, on being lawfully convicted thereof, be imprisoned with or without hard labour for any term not exceeding three months.

(a) 3 C. & K. 295.

(b) § 371.

1866.
Ex parte
MONSON.

not to support the conviction or the record), that he did in fact give evidence of the payment of the man's passage money—or rather, that he provided the servant with a passage—although no trace of it appears on the depositions on the charge. As to *Ex parte Speer*, September 4, 1866, we did not on that occasion refuse to receive the justice's affidavit, or allow it to be filed—for in fact it had been filed and read before the question was raised. But we refused to receive or act on it for the purpose of supplementing the case before the justices; on which we decided with regard only to the evidence and proceedings apparent on the record.

Butler showed cause. The affidavits now before the Court show that it appeared on the evidence before the justices, that *Hindmarsh* caused ten shillings to be paid for *Monson's* passage from Sydney to Kiama, and that was clearly an advance of wages; and therefore the conviction is good under the third section. But the applicant is estopped from making the present motion, as he has taken out and served the Judge's order dismissing the present application; *Ex parte Keogh (a)*. It is admitted that when he served the order he gave notice of appeal; but it is submitted that he did not thereby avoid the effect of service. The point now relied on in argument is, that upon the information as framed this conviction cannot be sustained. But the only objection relied on in Chambers, and therefore available upon the present application, is that the evidence did not justify the conviction. It is submitted that as the agreement was before the justices, they might infer from that that the master had made an advance.

Stephen in reply. How can the allegation that an agreement was entered into be evidence that the master had performed his part of the agreement? The advance for travelling expenses was not wages.

STEPHEN, C. J. I am of opinion that the prohibition must go, and that the Judge's order in Chambers dis-

(a) 2 Sup. Ct. R., C. L. 210.

missing the application, and with costs, must be rescinded. It would be most dangerous to allow proceedings to be taken under one section of a statute which inflicts a fine, and evidence to be taken in support of such proceedings; and then to allow the justices to convict under another section, which provides the punishment of imprisonment. Such a state of the law would, in my opinion, be most intolerable. The justices ought to take care that there is inserted in the depositions evidence sufficient to show the offence of which they adjudicate the defendant to be guilty. In the present case they have punished the applicant under the third section, on the ground that there has been an advance of wages. Whereas they received evidence as if the proceedings were taken under the second section, which deals only with a breach of contract. But though the blunder of the justices is great, and they are blameable for not having caused the evidence as to the advance to be taken down, we think that, as the fact of such advance on account of his wages was shewn at the hearing, and as the appellant has in his affidavit in support of this application denied that he received any wages, and as he refused to perform his service to the extent of the advance, the merits are with the master, and the writ must go without costs. But for these circumstances we should have given costs against the justices, as the case is a gross one. The servant does not also appear to have shown any sufficient excuse for his refusal to serve to the extent of the advance, or for his absconding. We think that substantially under the words of this agreement any advance, if made, was on account of wages.

I think the applicant had a right of appeal, notwithstanding the service of the Judge's order, because that service was accompanied with a notice that he intended to appeal. It is like the payment of money under protest. I may add that the justices state in their affidavit that evidence was given of the payment of this advance. There is no reference to any such evidence in the depositions, and the omission of it is gross dereliction of duty on the part of the clerk and the justices.

1866.

Ex parte
MONSON.

1866.

Ex parte
MONSON.

HARGRAVE, J. I think the applicant had offended under the third section. The advance of ten shillings comes within the meaning of the word wages, as contained in the agreement. The information was not strictly under either the second or third sections, for the word abscond will not be found in either. The charge therefore was, in my opinion, as much under the third as the second section; and the justices believed that they were proceeding under the third section. It is clear that costs ought not to be given in such a case against the justices.

CHEEKE, J. I think the prohibition ought to go, but without costs. The justices acted without jurisdiction when they proceeded under the third section.

Rule absolute.

September 4.

Ex parte GIBLIN and another (a).

On motion to set aside a settlement under the 7th section of the Insolvent Act, it appeared that the settlement was executed within twelve months before the sequestration of his estate by the insolvent, who had a life interest in four houses—his eldest son having the reversion in fee. The father and son conveyed the houses to a trustee, to

raise money on them for repairs, and subject thereto, on trust for the former's wife for her life, and then for two younger children till twenty-one, with remainder to the eldest son, the original reversioner. No money had been raised for repairs—and all the rent had been paid by the trustee to the wife. *Held*, that the settlement was not voluntary.

(a) Before *Stephen, C. J., Hargrave, J., and Cheeke, J.* (b) 5 Vic., No. 17.

DAVIS, on behalf of *Thomas Mansell Giblin* and *Gideon Cranston*, creditors of one *John Hamilton* an insolvent, moved, under the seventh section of the Insolvent Act (b), on notice, to set aside a deed of settlement of four houses in Sydney, executed on the 17th July, 1865, by *Hamilton*, within twelve months before his sequestration.

It appeared that under his father's will the insolvent had a life interest in the houses in question, with a reversion to his eldest son in fee. By the deed now sought to be set aside, the insolvent and his eldest son conveyed the houses to a trustee, to raise money on them for repairs, and subject thereto, on trust for the wife of the insolvent for her life, and then for two younger children of the insolvent, until they were twenty-one years of age, and finally for the eldest son, the original reversioner. It

appeared that no money had been raised for repairs, and that all the rent had been paid by the trustee, under the settlement, to the wife. Before the execution of the deed of settlement, there had been a contract for the sale of a station in Queensland to the insolvent, by the creditors (*Giblin* and *Cranston*) making the present application. This contract was made in November, 1864. Under it the purchase money was payable by instalments; one-third of the price to be payable on delivery, one-third in three months, and the balance in six months. There was also a power of sale in case of non-payment. Delivery of this station had been given in February, 1865. An action had been brought for the breach of this contract by the creditors, in July, a few days after the execution of the deed of settlement; and, pending the action, the vendors exercised their power of sale. The action was tried, and a verdict was obtained by the plaintiffs. The damages were calculated after giving credit for the amount obtained on the resale of the station. Judgment having been signed, the plaintiffs (the now applicants) obtained the compulsory sequestration of *Hamilton's* estate. It is contended that this deed has been executed without valuable consideration, for the mere purpose of keeping the property from the insolvent's creditors, and providing for his wife and children. In *Sempill v. Lee* (a), speaking of this seventh section, *Stephen*, C. J., in delivering judgment, says, "since the alienation was within twelve months before sequestration, it would as against all then existing creditors, if without valuable consideration, be liable to be set aside." He adds, "it is obvious that the term valuable consideration cannot, without involving an absurdity, be taken to mean or include any and every pecuniary advance or payment, whatever the amount. It would be admitted that no conveyance founded on a payment or consideration merely illusory, for instance, could be supported. If the money consideration be such as irresistibly to suggest the idea that some other inducement than this caused (and not merely influenced) the

1866.

Ex parte
GIBLIN
and another.

(a) 4 Sup. Ct. R., Eq. 103

1866.

Ex parte
GIBLIN
and another.

act of alienation, such consideration cannot, in my opinion, be deemed a 'valuable' one, within the intent and meaning of this enactment." The debt was really due before the settlement, and the "cause of it" arose several months before. It is quite clear that a conveyance from a husband to a wife, without any pecuniary consideration moving from the wife, is void as against creditors: *Fitzer v. Fitzer* (a), *Taylor v. Jones* (b). As regards the rights of these creditors, the stipulations in favour of these collateral relations are voluntary and void. He referred to *Myddleton v. Lord Kenyon* (c), *Pulvertoft v. Pulvertoft* (d), and to *Twyne's case* (e).

The *Attorney General* and *Wilkinson* shewed cause. There was a valuable consideration. The son conveys his reversion, in consideration of his father providing for his mother and her young children. And similarly the father conveys, in consideration of his son, the reversioner, joining in the provision. The concurrence of either party was necessary, and amounted to a valuable consideration. In *Pulvertoft v. Pulvertoft* (f) Lord *Eldon* says, "In the case, for instance, of a father, tenant for life with remainder to his son in tail, they may agree, upon the marriage of the son, to settle not only on his issue, but upon the brothers and uncles of that son; and the question will be whether they, although not within the consideration of marriage, are not within the contract between the father and the son—both having a right to insist on a provident provision for uncles, brothers, and sisters, and other relations, and to say to each other, 'I will not agree, unless you will so settle.'" He referred to *Heap v. Tonge* (g). There was also no debt contracted before the execution of this deed. If the insolvent was, at that time, free from debt, he is not affected by the provision of this section. In *Ex parte Weakley* (h), an application was made under this 7th section to set aside a voluntary settlement made

(a) 2 Atk. 512.

(c) 2 Ves. 410.

(e) 1 Sm. L. C. 1.

(g) 9 Hare 104.

(b) Id. 600.

(d) 18 Ves. 92.

(f) 18 Ves. 92.

(h) December, 1861.

by the insolvent *White*; and Mr. Justice *Milford*, in delivering judgment, thus expresses himself with regard to the jurisdiction created by this section, "This application is made to the summary jurisdiction given to the Court by the seventh section of the Insolvent Act, and I am of opinion that such jurisdiction cannot be carried beyond that given by the Act. There is no inherent jurisdiction in the Supreme Court, in its insolvency jurisdiction, to set aside or declare a deed to be void on a summary application." He then says, "This section enacts that all alienations made by any person after he has contracted any debt may be set aside; it is necessary, therefore, for the persons seeking the aid of the Court, to show that the insolvent had contracted a debt; and by a debt I apprehend is meant something substantial, not merely a trifling debt that might be owing for servants' wages, or to a butcher or baker. A good deal of argument was used to show whether or not the cause of debt arose before the alienation, which is another condition to be established before the creditor can apply to have the deed set aside. There must have been a debt due at the time of the alienation, and the party applying must have had a cause of debt at that time." [*Stephen, C. J.* But before the alienation it seems there was one instalment overdue to his creditor, from whom he had purchased the station.] But the creditor had proceeded to sell the station, and therefore waived his right of action for the instalment. In this action brought for the two instalments, the plaintiff entered a *nolle prosequi* on the common counts, and got judgment only on the count alleging the contract of sale, and claiming damages for the breach. There being a power of sale, the contract was conditional, and, therefore, there was no debt. Where goods are sold on a condition, that if they be not paid for at a time specified, the owner may resell them, and the vendee shall be answerable for any loss on the resale, such is a conditional and not an absolute sale; and if, therefore, the vendee do not pay at the specified time, and the vendor resell at a loss, he cannot maintain an

1866.

Ex parte
GIBLIN
and another.

1866.

Ex parte
GIBLIN
and another.

action for goods sold and delivered; *Lamond v. Davell* (a). So where the defendant bought goods by auction, upon the condition that they were to be cleared away at the buyer's expense in fourteen days, and the price paid on or before delivery—and if any lots remained uncleared after the term allowed, the deposit money should be forfeited, the goods resold, and the loss on resale made good by the present purchaser, the Court seemed to think that after a resale by the vendor, as upon default made by the first purchaser, he could not recover against the first purchaser for goods bargained and sold; *Hagedorn v. Laing* (b). “If,” said the Court, “it be a contract of bargain and sale, it certainly is subject to a condition; for if the purchaser do not take the goods within a certain time, the seller may, by the terms, rescind the contract; he may resell; and if he resells, I think he shews his dissent to the contract of bargain and sale.” It is submitted that in this case the action was commenced too soon. How, under a contract like this, could there be a debt until the expiration of the term of credit? [*Stephen*, C.J. Would there not be a debt as soon as the first instalment was due and unpaid? (c).]

Davis in reply. The estate was sold by *Giblin*, and bought by the insolvent for £6000—payable, £2000 cash, and the residue by equal payments in three and six months; therefore, there was a debt due, at all events, in February and May, as to a portion, and payable, but left unpaid. And as to valuable consideration, can there be any doubt that the whole arrangement was solely to secure the property from his creditors (the present applicants, from whom he had bought a valuable estate), for his wife's benefit. It appears that not a shilling was expended by the trustee, nor any mortgage executed for repairs. So that there is nothing to support the deed, beyond the affection of the insolvent for his wife, and of the son for his mother.

(a) 9 Q. B. 1030.

(b) 6 Taunt. 166.

(c) See *Paul v. Dod*, 2 C. B. 800.

STEPHEN, C. J. It is necessary, under the seventh section of the Insolvent Act, to show that the insolvent had contracted a debt at the time he made the settlement. I decline to give an opinion in this case, whether the insolvent was so indebted. But, assuming that he was indebted at the time of the execution of the settlement (on the principle, *debitum in presenti solvendum in futuro*), yet, in my opinion, that settlement was for valuable consideration. The circumstances are suspicious. But it is clear that the son cannot defeat this deed, as against his mother, brother, and sister. The father has made over his life interest in order to get the houses repaired (for his son's benefit, eventually), and the son, in consideration of this, has made over his reversion for his mother's life, and for the benefit of his brother and sister, till they are twenty-one years of age respectively; and this again, being done at the father's request, became a valuable consideration by him to the father.

1866.
Ex parte
GIBLIN
and another.

HARGRAVE, J. I think no doubt ought to be thrown upon the opinion that there was a debt in this case. But, although the facts are suspicious, it is clear the settlement was not without valuable consideration.

CHEEKE, J., concurred.

Rule discharged with costs (a).

(a) See *Ithell v. Beane*, 1 Ves. 215.

1866.

June 8.

THE QUEEN *against* DALRYMPLE (a).

The prisoner obtained, by false pretences, from the steward of a club, money of which he was in charge, and for which he was responsible and accountable to the club.

Held, that the prisoner might be convicted of obtaining such money by false pretences, on an information laying the property in the money in the steward.

SPECIAL case reserved for the consideration of the Judges, under the 18 Vic., No. 8, by the Chairman of Quarter Sessions, holden at Sydney.

The prisoner was charged in the information with obtaining from one *Cassidy*, on, &c., a sum of £5, the property of *Cassidy*, by falsely pretending to him that a cheque for £6 11s. 10d., which he presented then to him, was a good and available cheque for the payment, and of the value, of that amount; whereas the contrary was the fact to the knowledge of the prisoner.

The case stated that "it was proved in evidence that *Cassidy* was the steward of the Union Club (of which the prisoner was an honorary member); that a portion of *Cassidy's* duty as such steward was to receive moneys from the members of the club for refreshments, &c., supplied to them, and to account for and pay over those moneys to the secretary of the club; that he (*Cassidy*) had charge of, and was responsible, for those and other moneys belonging to the club, so long as they remained in his hands; that the prisoner came to *Cassidy* on the day in question, and enquired for his (prisoner's) account; that it was given to him by *Cassidy*, and amounted to £1 11s. 10d.; that very soon afterwards prisoner presented to *Cassidy* a cheque drawn by prisoner upon the Oriental Banking Company, in favour of the Union Club, or bearer, for £6 11s. 10d., and asked *Cassidy* to give him the change (or difference between that sum and the £1 11s. 10d., amount of his account); that *Cassidy* thereupon handed to him £5; that he did so believing the cheque to have been a good and available one, and that if he had not so believed, he would not have given him the £5 upon the cheque. And although *Cassidy* stated, upon cross-examination, that he would have given the prisoner £5

(a) Before *Hargrave*, J., and *Checke*, J.

out of the club money, if the prisoner had asked him (*Cassidy*) to do so, he added that the prisoner did not ask him to lend him (the prisoner) £5; and that he (*Cassidy*) gave the prisoner the £5 (which he obtained from him) upon the faith of the cheque.

1866.
The QUEEN
v.
DALRYMPLE.

The prisoner left Sydney on obtaining the £5 from *Cassidy*; and he (prisoner) had no account whatever with the Oriental Bank. The cheque was accordingly dishonored, when sent in for payment on the 19th January, 1866, by the secretary of the club, to whom it was handed over by *Cassidy* on that day, when accounting for the moneys of which he had then charge as steward of the club.

The jury found the prisoner guilty."

The counsel for the prisoner moved, in arrest of judgment, that the property in the £5 had been improperly laid in *Cassidy*; and requested the learned chairman, if he did not sustain the objection, to reserve the question for the consideration of the Court. There were other questions reserved; but the point above stated was the only one on which the Court delivered judgment.

Salomons for the prisoner. The property was not rightly laid, and the conviction must be quashed. *Cassidy* was the steward of the club, and was accountable for the money in his possession belonging to the club, to *Bentley*, the secretary of the club. But it was not his property. *Cassidy* admits that he took the money of the club, and replaced it by the prisoner's cheque. He referred to *R. v. Webster* (a), *R. v. Burgess* (b), and *R. v. Rudick* (c).

Butler, for the Crown, contra. Until the property has come into the possession of the master, it can be described as the property of the servant. *Cassidy* was not a mere servant, but was a person accountable for the money which was in his possession and custody. The principle is, that when a person is accountable for, and

(a) 31 L. J. M. C. 17.

(b) 32 L. J. M. C. 185.

(c) 8 C. & P. 237.

1866.
The QUEEN
v.
DALRYMPLE.

has the control of, money, he is not such a mere servant, so that the property in such money cannot be laid in him. If *Cassidy* had misappropriated this money, he would have been guilty of embezzlement, as it had not arrived at its ultimate destination; *R. v. Watts* (a). He referred to *R. v. Hutchinson* (b), *R. v. Remnant* (c), and *East P. C.* (d).

Cur. adv. vult.

July 6.

HARGRAVE, J., now delivered judgment in this case as follows :—

In this case, which was recently argued before Mr. Justice *Cheeke* and myself, we are clearly of opinion that, as the money obtained by the prisoner from the steward of the club was money he had charge of, and for which he was responsible and accountable to the club, the indictment was properly drawn as laying the property of such money in the steward. See *Rex v. Bramley* (e), *Reg. v. Walter Watts* (f), *Reg. v. Webster* (g), and *Reg. v. Burgess* (h)—which are clear authorities in support of the present indictment.

As the Court decides this point against the prisoner, and as the argument in this case was before two Judges only, we do not think it desirable to decide the other point, viz., whether the District Court Judge had power, under the words of the Colonial Statute, 13 Vic., No. 8, to reserve a question of law, not taken until after verdict, but before sentence; whether the point be taken on the application of counsel “*during the trial*,” or be reserved by the Judge, and having “*arisen on the trial*.” The conviction therefore stands confirmed.

Conviction sustained.

(a) 19 L. J. M. C. 192.
(c) R. & R. 136.
(e) 1 R. & R. 478.
(g) 31 L. J. M. C. 17.

(b) R. & R. 412.
(d) 2 Vol. 652.
(f) 19 L. J. M. C. 196.
(h) 32 L. J. M. C. 185.

1866.

ARMSTRONG and wife *against* FULLER (a).

THE first count was by the two plaintiffs, for the false imprisonment of the wife. The second count by the husband alone, for loss occasioned by the loss of the wife's society. Pleas (1), not guilty; (2), after stating that the trespasses in the two counts were identical, the plea alleged that at the time, &c., the defendant was possessed of a certain dwelling-house at Kiama, and that *Sarah Armstrong* being then found by the defendant in and upon the said dwelling-house for an unlawful purpose, within the true intent and meaning of the Vagrancy Act, 15 Vic., No. 4, the defendant gently laid his hands on the said *Sarah Armstrong*, in order to apprehend her, doing no more than was necessary for that purpose, and then and there apprehended her, and delivered her to a constable of the place where she was so apprehended, to be forthwith taken and conveyed before some justice of the peace, in order that she might be dealt with according to law; and the constable accordingly took the said *Sarah* into custody, and imprisoned her for a reasonable time at the police station, for the purpose of bringing her, and he did bring her, as soon as conveniently could be, before certain justices of the peace, at Kiama, to be dealt with according to law, in respect of the said offence; and the said justices having duly proceeded in respect of the said charge or offence, and having heard and determined the same according to law, adjudged the said *Sarah* to be guilty, and convicted her of being a rogue and vagabond within the true intent and meaning of the said Act; and the said justices further adjudged that the said *Sarah* should be, and she was, imprisoned in Her Majesty's nearest house of correction, in Kiama, for the space of one hour; which are the supposed trespasses in the counts alleged.

By sect. 7 of the Vagrant Act, any person may apprehend any person "who shall be found offending against the Act," and deliver him to a constable, to be taken before a justice who may convict in a summary way. The defendant arrested the plaintiff and gave her in charge to a constable. The plaintiff was taken by the constable before a justice, and having been charged, under sect. 3 of the same Act, with being a rogue and a vagabond, by having been found in the defendant's dwelling-house for an unlawful purpose, was convicted of such offence in a summary way. The plaintiff having sued the defendant for such arrest, *Held* that, even assuming that the conviction was

wrong in form and substance, and that there was no offence whatever committed against sect. 3 of the statute, the conviction being unreversed was a complete answer to the action.

(a) Before *Stephen, C. J., Hargrave, J., and Faucett, J.*

1866.
ARMSTRONG
and wife
v.
FULLER.

Averment, that the said conviction has not been appealed against, and the same is still in full force and unreversed. Issue thereon.

At the trial before *Stephen, C. J.*, in the November sittings, 1865, it appeared that there had been a dispute and some litigation between the parties, as to a certain house and land at Kiama, and that the female plaintiff had entered the house; that the defendant came in and asked what she was doing there, and that she said, "to maintain my rights to the place; that it belonged to us, and not to him." Some constables appearing, the defendant gave the female plaintiff in charge, for being illegally on his premises for an unlawful purpose. The plaintiff was then taken to the lock-up, where she remained until bailed. The case came on before the justices about ten days afterwards, when the plaintiff was convicted and sentenced to be imprisoned for one hour.

It was objected, on behalf of the defendant, that the conviction being unreversed was conclusive, and must be taken to establish, as between the parties, that the plaintiff was found on the premises for an unlawful purpose, within the meaning of the statute, 15 Vic., No. 4, ss. 3 and 7.

The learned Judge, although inclined to think the objection fatal, left the case on the second plea to the jury, who found for the plaintiff. The issue on the first plea was entered for the plaintiff; the defendant having leave to move to enter the verdict on the second plea, if the Court should think the matter stated therein was a bar in point of law to the action.

November 29,
1865.

Salamons moved accordingly, citing *Ex parte Clarke* (a), *Brittain v. Kinnaird* (b), *Jackson v. Hill* (c), and *R. v. Dunn* (d).

June 14, 1866.

Isaacs and *Windeyer* showed cause. If Mrs. *Armstrong* was not a rogue and vagabond at the time of her arrest, she could not become one afterwards, merely by

(a) 2 Q. B. 633, 635.
(c) 10 A. & E. 492.

(b) 1 B. & B. 432.
(d) 12 A. & E. 609.

the adjudication of the justices. A trespass having been committed, a right of action accrued which cannot be divested by matter *ex post facto*. It is submitted that the conviction by the justices is only evidence in their favour ; but it is no evidence in favour of the prosecutor who set the justices in motion.

1866.
ARMSTRONG
and wife
v.
FULLER.

It is apparent on the face of the proceedings that the justices had no jurisdiction, and, therefore, the conviction by them affords no answer ; *Addison* on Torts (a). As the plaintiff claimed title, the justices had no power to inquire further. The case was this : by the seventh section of the Vagrant Act any person is entitled to arrest any one who may be " found offending against " the Act, and take him before a justice, who may convict in a summary way. The defendant arrested the plaintiff under this section, and gave her in charge to a constable. The plaintiff was charged with being a rogue and a vagabond, by having been found in the dwelling-place for an unlawful purpose, under the third section ; and was convicted by the justices of having been found in a dwelling-house for an unlawful purpose. [Stephen, C. J. Ought not the justices to have expressly adjudged the person to be, in law, a rogue and a vagabond ? They did convict the plaintiff, however, of having been found in a dwelling-house for an unlawful purpose ; and the fifteenth section provides that it will be sufficient to state the offence in the words of the enactment declaring such offence.]

Sir *W. Manning*, Q. C., and *Salamons* contra, were stopped by the Court.

STEPHEN, C. J. I think that we ought not to call on the defendant's counsel to reply. I am not aware of any case which says that the decision of a justice in a case of this kind will be an answer to an action. But if the law be otherwise, every one putting the law in motion would be liable to most vexatious proceedings, even although he has obtained a conviction. But, in my opinion, assuming that the conviction was wrong in form and in

(a) p. 620.

1866.

ARMSTRONG
and wife
v.
FULLER.

substance, and moreover that (as I for one clearly conceive) there was no offence whatever committed against the statute, is it not, while unreversed, a complete answer to this action? The defendant merely undertook to satisfy the duly constituted judicial tribunal, that the plaintiff committed the offence for which he arrested her; the defendant having the legal power so to arrest, and to take her thereupon before such tribunal. And it would be intolerable if a prosecutor were, notwithstanding—after he succeeded before such tribunal—to be made answerable in an action for such arrest. If the plaintiff was guilty, she was rightly arrested. If she was not guilty, her proper course was to have appealed against the magistrates' decision. Until reversed or quashed on such appeal, we are all of opinion that the defendant is protected by it. As to the plaintiff's objection that there was no jurisdiction in the justices, that would of course be fatal were the point established. But in a case of this kind the mere assertion, or even admitted fact, that the plaintiff was in the dwelling-house under a claim of title, would not oust the jurisdiction, however good as matter to show that she was no rogue or vagabond. Moreover, the Court had no judicial knowledge that the justices were apprised that the plaintiff did enter under a claim of right; and if so apprised, they may have believed such assertion and claim to be a mere fiction. The verdict therefore, on the second issue, which raises this defence, must be entered for the defendant.

HARGRAVE, J. I quite concur. It would be dangerous to throw any doubt on the doctrine enunciated in *Brittain v. Kinnaird*. The conviction is conclusive evidence of the facts stated in it. Until reversed, it must be taken as between these parties to be the best possible evidence that the plaintiff was a rogue and vagabond.

FAUCETT, J. This is a conviction by a tribunal having jurisdiction over the subject-matter. Evidence tending to show that the plaintiff was not guilty, does

not oust this jurisdiction. The conviction is in respect of the very circumstances under which the arrest was made, and relates back to those circumstances ; and alleges that those circumstances were sufficient to justify the arrest.

1866.
ARMSTRONG
and wife
v.
FULLER.

Judgment accordingly.

MUNICIPALITY OF WATERLOO *against* HINCHCLIFFE (a). June 20, 1866.

THE first count of the declaration stated that the Municipality of Waterloo sued the defendant for that before and at the time of the committing of the grievances hereinafter mentioned, the plaintiffs were and

The first count of the declaration stated that the defendant was possessed of a wool-

washing establishment, near to a watercourse and certain roads and lands of the plaintiffs ; and that the defendant kept his premises so insufficiently and improperly constructed, and in such a bad state of repair, and so negligently and improperly used them, that he caused great quantities of water to overflow therefrom, over the plaintiffs' said roads and lands, and into the said watercourse—whereby sundry culverts and bridges on it were broken, and the roads and lands became torn up and otherwise damaged.

The second count charged that the defendant wrongfully caused a large overflow of water from his premises, in and upon the watercourses, roads, and lands of the plaintiffs ; whereby the culverts and bridges were broken, and the roads and lands torn up.

Plea, that the watercourses, roads, and lands, at the time of the acts complained of, were the soil and freehold of Sir *D. C.* and *T. B.* ; and that the defendant did the acts by their permission. *Held*, on demurrer, bad.

Another plea set up a lost deed, whereby the then owner in fee of the watercourses, roads, and lands (not named) granted to the then owner in fee of the woolwashing establishment, whose estate the said Sir *D. C.* and *T. B.* had at the time of the grievances, and to his heirs and assigns, the right—for themselves and their tenants—of discharging “surplus” water from those premises, for their more convenient use and occupation, over and into the said roads, lands, and watercourses. The plea then alleged that Sir *D. C.* and *T. B.*, being seised of the establishment, demised it by deed, together with all rights under the said grant, to *T. H.* and his assigns ; and that the defendant, being the latter's tenant, committed the grievances in the exercise of the aforesaid right. *Held*, on demurrer, a good answer to the second, but not to the first count.

Another plea stated, that before the plaintiffs had any interest in the watercourses, roads, and lands, or any of them, Sir *D. C.* and *T. B.* were seised in fee of the woolwashing establishment, and also of those lands, and the land on which the said roads and watercourses have since been constructed, and also of a dam adjoining ; and that, being so seised, the said Sir *D. C.* and *T. B.* demised the said establishment and dam to *T. H.* and his assigns, for a term still unexpired, with the right to discharge “surplus” water from the premises, for their more convenient use and occupation, upon and over the aforesaid lands—now of the plaintiffs. The plea then stated that *T. H.*, by deed, assigned the term, together with that right, to the defendant, who accordingly discharged the surplus water as he lawfully might. *Held*, on demurrer, no answer to the first count, but a good plea to the second.

(a) Before Stephen, C. J., Hargrave, J., and Faucett, J.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

still are a Municipality, duly constituted in accordance with the provisions of the Municipalities Act of 1858, and the defendant was possessed of certain premises known as the Waterloo Woolwashing Establishment, situate within the Municipality of Waterloo—which said premises were, at the several times aforesaid, used by the defendant as a woolwashing establishment, and the said premises were adjoining or near a certain watercourse, and certain roads, ways, and lands of the plaintiffs; and that the defendant being so possessed of the said premises as aforesaid, did, on divers days and times, keep and continue his said premises, so used by him as aforesaid, so insufficiently and improperly constructed and in such an insufficient and improper state of repair, and did so improperly and negligently use the same, that he caused and permitted large quantities of water to overflow from his said premises into the said drain or watercourse of the plaintiffs, and into, upon, and over the said roads, ways, and lands of the plaintiffs, in so much that the said drain was burst by the said overflow, and certain bridges and culverts upon the same were broken and otherwise damaged, and the said roads and ways were torn up and greatly damaged, and the said lands were flooded; and by reason of the premises the plaintiffs were prevented from having so beneficial a use and occupation of the same as they otherwise would have had, and were put to expense in repairing the damage so caused as aforesaid by the said overflow, and in digging and making dams and drains to carry off the said water, and in erecting and making other bridges and culverts, and in repairing the bridges and culverts so damaged as aforesaid.

The second count stated that the defendant, being possessed of the premises in the first count mentioned, did, on the days and times in the said count mentioned, wrongfully cause and permit a large overflow of water from his said premises, in and upon the drain or watercourses, roads, ways, and lands of the plaintiffs, being such municipality as in the first count mentioned; whereby the said drain was burst, and certain bridges

and culverts upon the same were broken and otherwise damaged, and the said roads and ways were torn up and greatly damaged, and the said lands were flooded; and by reason of the premises the plaintiffs were prevented from having so beneficial a use and occupation of the same as they otherwise would have had, and were put to expense in repairing the damages so caused as aforesaid by the said overflow, and in digging and making dams and drains to carry off the said water, and in erecting and making other bridges and culverts, and in repairing the bridges and culverts so damaged as aforesaid.

Pleas; (3) That before, &c., the watercourses, drains, roads, ways, and lands in the declaration mentioned, were the soil and freehold of Sir *D. Cooper* and *T. Buckland*; and the defendant, by their permission, committed therein the grievances complained of.

Demurrer and joinder.

(4) That at the times, &c., Sir *D. Cooper* and *T. Buckland* were seised in fee of the woolwashing establishment in the declaration mentioned, and of a certain dam thereto adjoining, appertaining, and belonging, and long before the times of the alleged grievances, by a deed made between the then owner of the watercourses, drains, roads, ways, and lands (now of the plaintiffs), and which adjoin the said woolwashing establishment, and which said owner was then seised thereof in fee, and the then owner of the said woolwashing establishment and dam, who was then seised in fee of the same, and whose estate therein the said Sir *D. Cooper* and *T. Buckland* had at the times of the alleged grievances respectively, (but which deed has been lost or destroyed by accident), the said then owner of the said watercourses, drains, roads, ways, and lands, granted to the said then owner of the said woolwashing establishment and dam, and to his heirs and assigns, the right—for himself and themselves, his and their tenants, undertenants and servants—of discharging surplus water from the said woolwashing establishment and dam, into, over, and through the said watercourses, drains, roads, ways, and lands, for the more convenient use and occupation of the said wool-

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

washing establishment and dam ; and that long before the committing of the alleged grievances, the said Sir *D. Cooper* and *T. Buckland*, being so seised in fee, and being so entitled under the said grant by deed, demised the said woolwashing establishment and dam, together with all rights acquired by them, under the said grant so lost as aforesaid, to one *T. Hayes* and his assigns ; and by virtue of the said grant and the said demise the defendant, at the times of the alleged grievances respectively, as and being the tenant of the said lessee of the said Sir *D. Cooper* and *T. Buckland*, of the said woolwashing establishment and dam, was entitled to the right of discharging the surplus water from the same, on, to, over, and through the said watercourses, drains, roads, ways, and lands, for the more convenient use and occupation of the said woolwashing establishment and dam ; and the defendant says, that the alleged grievances respectively were uses by the defendant of the said right.

Demurrer and joinder.

(5) That long before the committing of the alleged grievances, and before the plaintiffs had any estate, right, title, or interest of any kind whatsoever, in the said watercourses, drains, roads, ways, and lands, or any part thereof, and before the creation of the said Municipality of Waterloo, Sir *D. Cooper* and *T. Buckland* then being seised in fee of the lands whereon the ways, roads, watercourses, and drains, in the declaration mentioned, have since been made and erected, with the appurtenances, and being also seised in fee of the woolwashing establishment in the declaration mentioned, and of a certain dam thereto adjoining, appertaining, and belonging, with the appurtenances, by deed demised and granted to one *T. Hayes*, his executors, administrators and assigns, for a certain term of years, which has not yet elapsed, and which demise is still in full force and existence, the said woolwashing establishment and dam, with the appurtenances, including the right for himself and themselves, his and their assigns, tenants, and servants, to discharge surplus water from the said woolwashing establishment and dam, on, to, and over

the said lands, upon which the said ways, roads, watercourses, and drains have since been erected, for the necessary and more convenient use and occupation of the said woolwashing establishment and dam—now of the defendant ; and the said *T. Hayes*, under and by virtue of the said demise, before the committing of the alleged grievances, and before the creation of the said municipality, and before the making of the said ways, roads, watercourses, and drains, entered and became and was possessed of the said woolwashing establishment and dam, with the appurtenances, and continued so possessed until the assignment hereinafter mentioned. And that before the committing of the alleged grievances, and before the creation of the said municipality, and before the making and erection of the said ways, roads, watercourses, drains, bridges, or culverts, the said *T. Hayes* by deed granted and assigned to the defendant all his (the said *T. Hayes*’) estate, right, title, and interest in the said woolwashing establishment and dam, with the appurtenances, together with the right to discharge such surplus water as aforesaid ; and the defendant, under and by virtue of the said assignment, entered and became and was possessed of and occupied the said woolwashing establishment and dam, with the appurtenances, and from time to time as he required discharged the said surplus water from his said woolwashing establishment and dam, and continued so possessed and in occupation until and at the time of the committing of the alleged grievances ; and the defendant being so as aforesaid possessed, was of right entitled to discharge the said surplus water from the said dam, over, through, and upon the said lands, upon which the said ways, roads, watercourses, drains, bridges, and culverts have since been made and erected ; and that afterwards and before the committing of the alleged grievances the said municipality was created, and had full notice and knowledge of the premises, and it thereupon became and was the duty of the plaintiffs to make and form (and they did make and form) the said ways, roads, watercourses, and drains, over and through the said lands, and to take

1866.

MUNICIPALITY
OF
WATERLOO
V.
HINCHOLIFFE.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

upon themselves the care and management thereof; and that it thereupon became and was the duty of the plaintiffs in making the said ways, roads, watercourses, and drains, to provide proper culverts and other like appliances, so as to effectually carry off the surplus water from the said woolwashing establishment and dam of the defendant, when and as it was fit and necessary, in exercise of the said right—to permit such surplus water to flow from his said woolwashing establishment and dam; nevertheless, the plaintiffs so carelessly, negligently, and unskilfully formed and made the said ways, roads, watercourses, and drains, and the said culverts and other like appliances, and so negligently and unskilfully managed the same, that upon the defendant permitting the surplus water aforesaid to flow from his said woolwashing establishment and dam, as it was necessary for him to do, in order to beneficially enjoy the same, and as he was of right entitled to do, in consequence of the negligence, unskilfulness, want of proper care and management on the part of the plaintiffs, and not in consequence of any wrongful act on the part of the defendant, the said surplus water from the said woolwashing establishment and dam of the defendant so permitted to flow as aforesaid, did a little injure the said ways, roads, watercourses, drains, and lands, and the bridges and culverts thereupon, in the declaration mentioned, which is the alleged grievance.

Demurrer and joinder.

Darley, for the defendant, in support of the demurrer to declaration. The plaintiffs do not show that the name in which they sue is their proper corporate name. It should appear that this was the name given them by proclamation, by sect. 7 (a). The plaintiffs do not show that the watercourse and land alleged to be injured are within the municipal limits. [*Stephen*, C. J. But the declaration alleges that the watercourse and lands were and are “the watercourse and lands of the plaintiffs,” and that they are “a municipality duly constituted”

(a) See sections 2 and 6.

under, &c.] The plaintiffs have no right to sue in respect of the alleged injury—i.e., the causing an overflow of water from defendant's premises into and over plaintiffs' watercourse and lands. For the watercourses and roads are only under the plaintiffs' "care and management," by sect. 78; and, therefore, not being owners, they cannot maintain trespass. It is like the case of *The Duke of Newcastle v. Clark* (a), where it was held that commissioners of sewers cannot maintain trespass against wrong doers. [Stephen, C. J. But this is not an action of trespass; and, moreover, there are not only roads, but also "lands" alleged to have been injured, and to belong to the plaintiffs. It may be the fact, therefore, that the municipality is the owner in fee of the soil of both the roads and the lands.] It is also contended that no sufficient actionable damage is alleged. He referred to *Richards v. Whitford* (b), and *Bullen and Leake's* Precedents of Pleadings (c).

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

STEPHEN, C. J. I am against the defendant on all these points. Having regard to the second section, it sufficiently appears that the plaintiffs are a duly constituted municipality. As to the second point, the demurrer admits that the plaintiffs were the owners of the roads and lands. But this they could not be, unless they were within the municipality, sect. 7. The objection in *Richards v. Whitford* is not in point. There the only fact alleged and admitted by the demurrer was this: that *G. Barney* duly promised the land under the Orders in Council. But any (subsequent or previous) issue of a lease would invalidate the promise. It was clearly, therefore, a separate and independent matter to have been alleged.

HARGRAVE, J., and FAUCETT, J., concurred.

Butler, for the plaintiffs, in support of the demurrer to the pleas. The pleas must be a sufficient answer to both counts, or they are bad. The alleged right to discharge water over the plaintiffs' lands is an easement "in gross,"

June 21.

(a) 8 Taunt. 602. (b) 3 Sup. Ct. R., C. L. 294. (c) p. 22.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

and will not pass by assignment of the superior tenement, nor bind any subsequent owner of the servient tenement. "It would be," says *Creswell*, J., delivering the judgment of the Court in *Ackroyd v. Smith (a)*, "a novel incident annexed to land that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other land. And it seems to us that a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter." [*Stephen*, C. J. There being two tenements, A. and B.; the owner of A. grants to the owner of B. a privilege of discharging his surface water over A.; the plaintiff contends that in such a case, upon the sale of the dominant tenement B., this privilege will not pass; but suppose a change of ownership in the servient tenement A., but not in the dominant tenement (that is, in this case the woolwashing establishment), is this privilege or easement in that case destroyed?] As to the roads, these at all events are necessarily under the plaintiffs' care by the statute, and it is their duty to repair them. After plea, equally as after verdict, it must be assumed that the roads were public, and under our care. *Hopwood v. Whaley (b)*, and *Banks v. Angel (c)* were referred to, as to effect of pleading over.

What the plaintiffs complain of is, not that the defendant has discharged the water in question simply, but that he has discharged it negligently. [*Stephen*, C. J., referred to *Metcalfe v. Hetherington (d)*, and *Seymour v. Maddox (e)*.] Every one, in the conduct of that which is harmful to others, if misconducted, is bound to the use of due care and skill; and a wrong doer is not without the pale of the law for this purpose. In the *Mayor of Colchester v. Brooke (f)*, it was held that if property, as oysters, be placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has

(a) 10 C. B. 188.
(c) 7 A. & E. 856.
(e) 16 Q. B. 326.

(b) 6 C. B. 744.
(d) 11 Exch. 257.
(f) 7 Q. B. 337.

room to pass without so doing. The fact that such property was a nuisance, is no excuse for running upon it negligently. He referred to *Barnes v. Ward* (a), and *Townshend v. Nathen* (b). The plaintiffs complain of a wrong and bad construction and negligent keeping of the defendant's dam and works, whereby the water flowed down. [Stephen, C. J. What then? The defendant says, "I have a right to send down the overflow, and therefore the wrong construction or wrong keeping is no cause of complaint."] The negligence is the cause of the special damage, and this is not met by the pleas. He referred to *Brine v. Great Western Railway Co.* (c).

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

The plea of *Liberum Tenementum* is no plea to an action framed like this. On the pleadings, it appears that the plaintiffs' possession has been injured. The gist of the action is the injury caused by the defendant's negligence. How can it be an answer to say that the defendant is entitled to the freehold? For the Court will prevent the extension of the anomalous nature and construction of this plea to any form of trespass beyond that in which the usage has prevailed. It is submitted that the defendant could have no right to throw water even on his own land, if the act destroyed our water-courses there, and forced us to build them over again with new bridges, &c. *Doe v. Wright* (d), *Roberts v. Taylor* (e), and *Holmes v. Newlands* (f) were referred to.

Darley, for the defendant, in support of the pleas. Under the sixth section of the Acts Shortening Act (g), the word "land," in the seventh section of the Municipalities Act of 1858, includes messuages, tenements, and hereditaments, corporeal or incorporeal, of any tenure or description; and a municipality, therefore, may be seised in fee of ways and watercourses. But if so, it holds them in the same way as any other person, and not

(a) 9 C. B. 392; 19 L. J. C. P. 195.

(b) 9 East 280.

(c) 31 L. J. Q. B. 103. (d) 10 A. & E. 781. (e) 1 C. B. 117.

(f) 11 A. & E. 44. See *Ryan v. Clark*, 14 Q. B. 71; *Harrison v. Blackburn*, 34 L. J. C. P. 109.

(g) 16 Vic., No. 1.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHOLIFFE.

merely under section 73. The plea of *liberum tenementum* is good. Suppose *A.* having a house, leaves it in the morning, and that *B.* believing himself to be entitled to the house, takes possession of it. *A.* returning, finds *B.* in possession, and pumps water into the house so as to render it uninhabitable. In an action by *B.* against *A.*, for the nuisance, cannot *A.* plead that it is his house, and that he was entitled to do as he liked with his own? [*Stephen, C. J.* Surely not; the plea must say, "I have a right to the house, and you have none."] As to the fourth plea, it is submitted that this right alleged is not a grant or easement in gross, but is appurtenant to or inherent in the land. If *A.*'s lands adjoin *B.*'s lands, a right of way over *B.*'s land, granted by *B.* to *A.*, would not be a grant in gross. In other words, where profit in the land of one is claimed as appendant to the land of another, to be used on the land to which it is appendant, it is not in gross, but appendant to an estate; *Bailey v. Stevens* (a). There is nothing in the case of *Ackroyd v. Smith* to show that if the right of passing, &c., in question in that case, had been assigned, the grantee of that right would not have been entitled to it. He referred to *Hill v. Tupper* (b), and *Muskett v. Hill* (c). It is submitted that under the circumstances stated in the fifth plea, it is the duty of the plaintiffs to construct the requisite culverts, &c. Suppose that the culverts had been of sufficient strength to resist the water coming down from the woolwashing establishment, and had thrown it back upon the defendant's premises so as to injure them, the defendant, it is submitted, would have had a right of action against the plaintiffs. And so the defendant is not responsible for the injury caused by his surplus water to the plaintiffs, as it is through their own negligence the culverts are not strong enough to carry it away. The plaintiffs are liable for damages caused by the improper discharge of a duty imposed on them by statute; *Hartnall v. The Ryde Commissioners* (d), *Whitehouse v. Fellowes* (e). In this latter case,

(a) 31 L. J. C. P. 226.

(b) 32 L. J. Ex. 217.

(c) 5 B. N. C. 694.

(d) 33 L. J. Q. B. 39.

(e) 30 L. J. C. P. 305.

trustees of a turnpike road converted an open ditch, which used to carry off the water from the road, into a covered drain, placing catchpits with gratings thereon to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water, in very wet seasons, instead of running down the ditch as it formerly did before the alterations by the trustees, overflowed the road, and made its way into the adjoining land, and injured the plaintiff's colliery; and it was held that the trustees were liable for such injury, if they were guilty of negligence in respect of such gratings, &c. It has been held that a company undertaking for their own profit to maintain a channel for carrying off water, and neglecting to do so effectually, are responsible for damage done to the adjoining land, by reason of the banks giving way after an unusual rainfall, although other persons, who were bound to keep the outlet of the channel of certain dimensions, had failed to perform that duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way; *Harrison v. Great Northern R. Co.* (a). "Suppose A.," says *Pollock*, C. B., in his judgment, "has a drain through the lands of B. and C., and C. stops up the outlet into his land from B.'s, and A., nevertheless, knowing this, pours water into the drain and damages B., surely A. is liable to B." These authorities show, that if the averments in this plea, which are admitted by the demurrer to be true—namely, that these culverts were so improperly constructed by the plaintiffs that whatever injury accrued was owing to their want of skill—were proved, the defendant would have a right to sue the plaintiffs. The plea sets up the defence of contributory negligence. [*Stephen*, C. J. If the defendant had a right of discharging his surface water on the plaintiffs' land, *cadit quæstio*; if he had not such a right, how is the plaintiffs' negligence material?] Does not the plea say, "admitting that the defendant is negligent, the plaintiffs cannot complain, for they have been guilty of

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

(a) 33 L. J. Ex. 266.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.
June 22.

contributory negligence?" He referred to *Tuff v. Warman* (a).

Butler in reply. The pleas are bad, because they do not allege that the right was necessarily exercised, nor how. A new assignment is not necessary here. For "excess" is involved in the complaint in the declaration. He referred to *Corby v. Hill* (b), *Keppell v. Bailey* (c), and *Gale on Easements* (d).

Cur. adv. vult.

September 3.

STEPHEN, C. J., delivered judgment in this case as follows:—

The declaration in this case contains two counts. The first states, that the defendant was possessed of a wool-washing establishment, near to a watercourse and certain roads and lands of the plaintiffs; and that the defendant kept his premises so insufficiently and improperly constructed, and in such a bad state of repair, and *so negligently and improperly used them*, that he caused great quantities of water to overflow therefrom, over the plaintiffs' said roads and lands, and into the said watercourse—whereby sundry culverts and bridges on it were broken, and the roads and lands became torn up and otherwise damaged. The second count charges, that the defendant *wrongfully* caused a large overflow of water from his premises, in and upon the watercourses, roads, and lands of the plaintiffs; whereby the culverts and bridges were broken, and the roads and lands torn up.

To this declaration, several pleas have been put in; of which, the third, fourth, and fifth are demurred to. The third alleges that the watercourses, roads, and lands, at the time of the acts complained of, were the soil and freehold of Sir *Daniel Cooper* and *Thomas Buckland*; and that the defendant did the acts by their permission. The fourth plea sets up a lost deed, whereby the then owner in fee of the watercourses, roads, and lands (not named), granted to the then owner in fee of the woolwash-

(a) 27 L. J. C. P. 322.
(c) 2 Myl. & K. 527.

(b) 27 L. J. C. P. 318.
(d) pp. 9—13.

ing establishment, whose estate the said *Cooper* and *Buckland* had at the time of the grievances, and to his heirs and assigns, the right—for themselves and their tenants—of discharging “surplus” water from those premises, for their more convenient use and occupation, over and into the said roads, lands, and watercourses. The plea then alleges that *Cooper* and *Buckland*, being seised of the establishment, demised it by deed, together with all rights under the said grant, to *Thomas Hayes* and his assigns; and that the defendant, being the latter’s tenant, committed the grievances in the exercise of the aforesaid right.

The fifth plea states, that before the plaintiffs had any interest in the watercourses, roads, and lands, or any of them, *Cooper* and *Buckland* were seised in fee of the woolwashing establishment, and also of those lands, and the land on which the said roads and watercourses have since been constructed, and also of a dam adjoining; and that, being so seised, the said *Cooper* and *Buckland* demised the said establishment and dam to *Hayes* and his assigns, for a term still unexpired, with the right to discharge “surplus” water from the premises, for their more convenient use and occupation, upon and over the aforesaid lands—now of the plaintiffs. The plea proceeds to state, that *Hayes* by deed assigned the term, together with that right, to the defendant; who accordingly discharged the surplus water, as he lawfully might.

The fifth plea then sets up the following additional matter. That it was the duty of the plaintiffs, having knowledge of the premises, and having the care and management of the roads and watercourses aforesaid, so to construct their culverts and other appliances, that such surplus water should be effectually carried off; but that they so unskilfully made the watercourses, and negligently conducted themselves, that whatever injury accrued was owing to their own want of skill and care, and not to any wrongful act on the part of the defendant.

We have considered the several questions, which arise on the demurrers to these pleas, with the learned arguments on them; and we are of opinion as follows. The

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

third plea we think clearly bad. It was conceded, that there is no instance known of this form of pleading, except in trespass; and there its use has always been considered an anomaly. The plaintiffs no doubt assert (needlessly, it seems to us), that the watercourses, roads, and lands were their own. But this must be taken to mean, merely, that they were in the plaintiffs' possession; and the complaint is, not of an entry or intrusion on that possession, but of a consequential injury done to it, by a negligent or wrongful act committed at a distance. That some third person owned the soil at the time, can be no answer to such an injury so caused. The fourth plea, on the other hand, we think a good answer to the second, and not to the first count.

The defendant maintains in that plea that he has a right, as tenant to *Hayes*, the lessee by deed from *Cooper* and *Buckland* of the woolwashing premises, with all the rights granted to them, to discharge the surplus water from those premises. Now we will assume, that the plea justifies only the flow of surplus water, and that the defendant has all the rights which *Hayes* had. But neither *Hayes*, nor *Cooper* and *Buckland*, could justify as the user of that right an overflow by negligence and bad management; which is the charge contained in the first count. The right can only be, to discharge the surplus water when reasonably necessary; and not at the defendant's unqualified discretion. In any event, the overflow must not be the result of carelessness, an improper construction, or ill state of repair.

We think the plea, on the whole, a good answer to the second count; on the authority, mainly, of *Brine v. The Great Western Railway Company*, and *Bailey v. Stevens*, hereinafter cited. The chief difficulty is, as to the existence of a right in this defendant, by virtue merely of his holding under *Hayes*, without specific assignment of the right said to have been granted. But, having regard to the nature of the claim, and the stated terms of the grant, we think that the right may be holden to have vested in the defendant. Then, if so, the supposed wrongfulness of his act, as complained of in the second count, is apparently

justified. If, therefore, the plaintiff can allege matter showing it to have been, under the circumstances, wrongful—as, for example, by reason of the injury having really been caused by negligence, or other impropriety—he must set up that matter in reply.

1886.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

The fifth plea is not exposed to the difficulties, or either of them, which exist in the fourth—and to which we have adverted. While we think it, therefore, for the reasons already given, no answer to the first count, it is in our opinion a perfectly good plea to the second. The plaintiff may reply, as in the former case, should he desire to do so.

The additional matter stated in this fifth plea, however, appears to us to be utterly immaterial and out of place. Our reasons will be found in the remarks presently made on *Tuff v. Warman*; and we need not here add anything to them. The authorities most relied on, including that case, were the following.

Hartwell v. The Ryde Commissioners (a) merely decides that a corporate body, on which is cast the duty of keeping streets in repair, is liable to an action at the suit of a person injured by their non-repair—whether the Corporation has funds or not. *Corby v. Hill* (b) is more to the purpose. That action was for an injury done to the plaintiff, by the defendant's *carelessness* and *negligence* (expressly so charged), in placing slates on a private roadway—which the plaintiff was using by the owner's leave. The decision was, that an action lies under such circumstances; and that the defendant was not excused, by having had merely the owner's permission to put slates there.

Tuff v. Warman, in the same volume (c) (Exchequer Chamber), was relied on in support of the additional matter which is introduced into the fifth plea. Now the decision there was, that want of care or caution, in the person injured by negligence or unskilfulness, will not be a sufficient answer, if the act complained of could have been avoided by reasonable care on the defendant's part. The injury must, in fact, in order to sustain the defence, have been wholly attributable to the plaintiff; so that,

(a) 33 L. J. Q. B. 40. (b) 27 L. J. C. P. 318. (c) C. P. 322.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

but for his contributory negligence, the act itself would not have occurred. It cannot be pretended, however, that the plaintiffs here contributed to the overflowing of the water, or its escape as surplus water, from the premises of the defendant. Unskilfulness or negligence on their part may, perhaps, in some sense, have contributed to the damage occasioned by such overflow, by aggravating it; but that is not the question. The injurious act, for which alone the action is brought, was the letting of the water escape. The bursting of the pipes, and drains or culverts, was only the result more or less of that act.

Brine v. The Great Western Railway Company (a) requires consideration. Rightly understood, it is an authority in support of the fourth plea—and therefore, except as to the additional matter just referred to, in support of the fifth also. The plaintiff complained of the “wrongful” raising and continuing of an embankment; by means of which acts, water flowed against his premises and made them damp. The company pleaded that they erected and continued such embankment, under the authority of a statute. The plaintiff replied, that the work was done unskilfully. It was held on demurrer (the Chief Justice not concurring), that this replication—although informal, whether considered as a new assignment, or as a traverse of the plea—was in substance good. For the complaint in effect was, a *wrongful* causing of the overflow; to wit, as finally stated in the replication, by erecting the embankment in an improper manner, and continuing it so constructed without proper drains therefrom. But no objection was taken to the plea; which, in itself (*i.e.*, until countervailed by the explanatory matter), was admitted to be perfectly good.

Bailey v. Stevens (b), in the same volume of the Law Journal, shows that you cannot support a claim to the enjoyment of anything on another man's land by prescription, or as a tenant merely of land to which the right is said to be attached, unless the thing be connected with the enjoyment of the last-mentioned land. But it was not disputed, that there may be a grant of any such

(a) 31 L. J. Q. B. 103.

(b) C. P. 227.

right, or any right whatever in another's land, to a person and his assigns; and that, in each case, the right may be similarly transferred. See more particularly the judgment of Mr. Justice *Willes*. Here, however, the right is claimed in both the fourth and fifth pleas as an incident to, and in immediate connexion with, the enjoyment of the woolwashing premises; that is to say, for the purpose of its more beneficial use. And the fact is stated in the fifth plea, moreover, that the right was assigned by deed to *Cooper* and *Buckland's* tenant, and similarly by the latter to the defendant.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

We would remark on this case generally, that, had the watercourses and roads in question been stated to have been within the corporate boundaries, and under the care and management of the municipality, with the statutory duties attached to that position, for the public benefit, very different considerations might have arisen—having regard to the enactments in the Municipalities Act. But we have necessarily dealt with the case, simply, as it is stated on the record.

HARGRAVE, J., concurred.

FAUCETT, J. I concur in the judgment that has been just delivered. I wish however to add, in reference to *Brine v. The Great Western Railway Company*, that I should have thought with *Cockburn*, C.J., that the replication in that case was a departure from the declaration. The decision appears to me to do away with the distinction, in point of pleading, at all events, between a complaint founded on the doing of an act in itself wrongful, whereby an injury has been caused to another, and one founded on the careless or negligent performance of a lawful act, by which carelessness or negligence the injury has been caused.

As to the pleas being distributive, I have looked at all the cases handed in by Mr. *Butler*; but *Blagrove v. The Bristol Waterworks Company* (a) (which is not overruled) is a distinct authority for holding that the pleas are distributive. *Pollock*, C.B., there says as fol-

(a) 1 H. & N. 269.

1866.
MUNICIPALITY
OF
WATERLOO
V.
HINCHCLIFFE.

lows:—" *Gabriel v. Dresser* (a) is no authority for the proposition for which it is cited; and, if it were, I should not agree to it." See also *Cummings v. Clifford* (b), in this Court.

Judgment for plaintiffs, on the demurrer to the third plea. For plaintiffs also, on the demurrer to the fourth and fifth pleas, so far as they respect the first count. But for defendant, on the same demurrer, so far as those pleas respect the second count. With leave to plaintiffs to reply to the said pleas.

September 21.

Declaration on a guarantee in the following terms, given by the defendant to the plaintiffs: "Gentlemen, I hereby hold myself responsible for McC., for any liabilities he has or may have with your firm, in connection with his telegraphic contract with the N.S.W. Government, for the line between D. and the S.A. boundary." Averment, that relying on the promise of the defendant, the plaintiffs made further advances to McC. of money and goods. Breach, non-payment by McC. or the defendant, for such further advances. Held, on demurrer, good.

ROBERTSON and another *against* HEALY.

THE declaration stated that before and at the time of the promise by the defendant hereinafter mentioned, the plaintiffs had been and were carrying on business as storekeepers, at Deniliquin, and had from time to time, in the way of their trade, supplied goods and advanced money on credit to one *Andrew McAuley*, for the purpose of enabling him to carry out a contract with the Government of New South Wales for the continuation of a telegraph line between Deniliquin and the South Australian boundary; and that before and at the time of such promise the said *A. McAuley* had become liable to pay and was indebted to the plaintiffs in divers sums of money, for and on account of such supplies and advances; and the plaintiffs being unwilling to continue such supplies and advances without security, and the said *McAuley* being desirous to obtain from the plaintiffs such further supplies and advances on credit, in order to enable him to carry on the said contract with the Government of New South Wales, whereof the defendant had notice, the defendant, on the 31st day of July, 1865, by a certain promise in writing signed by the defendant and addressed to the plaintiffs, promised the plaintiffs in and by the words and figures following—that is to say, "Gentlemen, I hereby hold myself responsible for Mr. *Andrew McAuley*, for any liabilities

(a) 15 C.B. 622.

(b) 3 Sup. Ct. R. 187.

he has or may have with your firm, in connection with his telegraphic contract with the New South Wales Government, for the line between Deniliquin and the South Australian boundary." Averment, that confiding in the promise and undertaking of the defendant, the plaintiffs did accordingly, in the way of their trade as such storekeepers, at divers times, supply goods and advance moneys on credit to, and discount bills for, the said *Andrew McAuley*, for the requirements of and in connection with his said telegraphic contract—the liability in respect of which said subsequent supplies and advances of the said *Andrew McAuley* to the plaintiffs, before and at the commencement of this suit, amounted to £353 8s. 6d.; and although the plaintiffs did all things, and all things were done, and all times elapsed necessary to entitle the plaintiffs to a performance by the defendant of his said promise—and although the said sum was before and at the commencement of this suit due and payable by the said *Andrew McAuley* to the plaintiffs—and although the said *Andrew McAuley*, since the same became so due and payable, and before the commencement of this suit, was requested by plaintiffs to pay the said sum of money, yet the said *Andrew McAuley* did not pay the same, or any part thereof—whereof the defendant afterwards and before the commencement of this suit had notice, yet the defendant has not paid the sum of money so due from the said *Andrew McAuley* to the plaintiffs, and the same remains due and unpaid; and the plaintiffs claim £400.

Demurrer and joinder.

Darley in support of the demurrer to the declaration. It is clear law that, under the Statute of Frauds, to charge a person upon any special promise to answer for the debt of another, there must be a written agreement or memorandum thereof, which will not be valid unless the consideration is shown. The declaration contains averments showing what the consideration in fact was. But it is submitted that these cannot be used; nor would extrinsic evidence be admissible, to expand or explain the contract. The guarantee must stand or fall

1866.

ROBERTSON
and another
v.
HEALY.

1866.
ROBERTSON
and another
v.
HEALY.

by its own terms. It is clear that an agreement of guarantee must disclose both the consideration and the promise; *Saunders v. Wakefield* (a), *Smith's Leading Cases* (b). It is impossible to say what the consideration for this contract here is, whether forbearance to sue for a past liability, or the supplying of goods—the incurring of future liability; so that this case differs from those which may be cited where the guarantee was merely for the payment of goods, to be delivered as in *Stadt v. Lill* (c). But the decision in *Raikes v. Todd* (d) is upon an instrument precisely like the one sued upon, and is expressly in point to show that it is not a valid guarantee. In that case the guarantee was, “Oct. 19, 1832.—I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance, to D., on his account with you, commencing 1st November, 1831, not exceeding £2000;” and it was considered invalid, on the ground that it was doubtful whether the consideration consisted of forbearance to sue for the past advances, or partly that, and partly the making of further advances. If in a guarantee two distinct considerations may, with equal probability, be inferred as the inducement for the engagement, the writing is not taken out of the operation of the Statute of Frauds, and consequently can give no right of action. The Mercantile Law Amendment Act (e) is not in force; but even if it were, *Holmes v. Mitchell* (f) shows that this guarantee would not be valid, because the promise, as in that case, is unintelligible without the assistance of parol evidence, which is inadmissible. He referred to *Haigh v. Brooks* (g), and *Boehm v. Campbell* (h).

Stephen in support of the declaration. If the consideration can be fairly, and without ambiguity, collected or inferred from the memorandum, that is sufficient. It is submitted that the surrounding circumstances may and ought to be looked at, in order to explain the contract; *Hoad v. Grace* (i). In that case *Bramwell, B.*, says,

(a) 4 B. & A. 596.

(c) 9 East 348.

(e) 19 & 20 Vic., c. 97.

(g) 10 A. & E. 309.

(b) 1 Vol. 266; 2 Vol. 203.

(d) 8 A. & E. 846.

(f) 28 L.J.C.P. 301.

(h) 8 Taunt. 679. (i) 31 L.J. Ex. 98.

"If the words of the instrument, primarily, did import a past transaction, evidence might be admitted to show that there was no past transaction, or if there was, that the parties did not contemplate it." A good consideration can be collected from the contract if it is applied to those circumstances; *Haigh v. Brooks* (a), *Kennaway v. Treleavan* (b), *Russell v. Moxley* (c). In *Oldershaw v. King* (d) a liberal construction was applied to the guarantee; and although the only consideration mentioned in the instrument was forbearance to press for payment of the debt due at the time, the Court construed it as if the consideration was such forbearance and also the future advances, which, though not stipulated for, it was contemplated should be made. The case of *Westhead v. Sproson* (e) is not applicable; for it was clear that there was no binding agreement on the plaintiff to do anything. The decision in *Raikes v. Todd* (f), which has been relied on by the other side, is only, as is said by Lord Campbell in *Bainbridge v. Wade* (g), that the consideration alleged in the declaration was not proved by the written guarantee.

1866.
ROBERTSON
and another
v.
HEALY.

Darley in reply. The consideration must not be mere matter of conjecture. The breach here is, the non-payment for goods supplied after the giving of the guarantee; and it is ambiguous whether the consideration was forbearance, or further advances, or both.

STEPHEN, C.J. I think the declaration is good, whether the surrounding circumstances are or are not looked at. Looking at the circumstances stated, we can construe the contract without difficulty to be that, in consideration (alone) of future assistance to *Andrew McAuley* by supplies of goods and money to carry on his contract with the Government, the defendant promised to pay for the same, and also for what was then due.

It is also clear, in my opinion, that the circumstances are to be looked at in construing the contract. But

(a) 10 A. & E. 317.

(b) 5 M. & W. 498.

(c) 3 R. & B. 211.

(d) 2 H. & N. 517; 27 L.J. Ex. 120.

(e) 30 L.J. Ex. 265

(f) 8 A. & E. 846. (g) 20 L.J.Q.B. 7.

1866.

ROBERTSON
and another
v.
HEALY.

even without reference to these, in the present case, I should and do so construe it. In *Raikes v. Todd* the circumstances were very different. That was the case of a customer of a bank, and his "running account" was to be "secured" by the defendant. That was an undertaking of no small doubt as to construction. But here it is a simple case. Mr. *McAuley* wanted more supplies and more money. These were the circumstances to which we must apply this contract. The plaintiffs would not give any without security; which the defendant agrees to give, undertaking to pay also the past debt, if further goods be supplied. I do not see that there was any promise of forbearance.

CHEEKE, J. On the face of the guarantee, it seems to me that a sufficient consideration appears. I also think that in construing the contract the surrounding circumstances must be looked at.

FAUCETT, J. The surrounding circumstances are to be looked at in construing this agreement. There is no statement in the declaration as to forbearance, but only as to the necessity of further advances; and the only consideration, in my opinion, is the future advances, whether the document itself, or whether it and the surrounding circumstances are regarded. It seems also to me, that it is the duty of the Court to give effect to contracts of this kind. For on the faith of these kind of documents large advances are continually being made. And parties ought not to be favoured in their attempts to get rid of liabilities created by means of such instruments.

Judgment for the plaintiff (a).

(a) *Quære*, whether, having regard to R. 35 of April, 1856, on a demurrer to a declaration, any question under the Statute of Frauds can arise?

1866.

MOREHEAD and another *against* McISAACS and another.

THIS was an action against *McIsaacs* and *Neville*, for goods sold and delivered. The defendant *McIsaacs* did not appear, and judgment therefore was signed against him. The other defendant, *Neville*, pleaded never indebted. Issue thereon.

At the trial before *Faucett, J.*, in the February sittings, it appeared that *McIsaacs* had been carrying on business in Sydney as a coal merchant, and that he had incurred certain liabilities to the plaintiffs for coal. On the 11th July, 1865, the defendant *Neville* entered into partnership with *McIsaacs*, in the business. Afterwards, one *Mills*, the plaintiffs' agent, called on the defendants for a settlement of the old debt due by *McIsaacs*; and the evidence of *Mills*, as to that interview, is as follows:—He said, "the conversation between *McIsaacs* and me was in reference to the coal already delivered. The amount due was mentioned. *Neville* was present. *McIsaacs* produced him, and said, "this is the partner I have spoken of so long. I have shown him the accounts, and he is satisfied. He understands them perfectly well." *Neville* said that he had seen the accounts, and was satisfied. *McIsaacs* then said, 'will you furnish the coals I have so long asked for?' He then said that *Neville*, understanding the accounts, would pay for the coals already delivered. I said that if Mr. *Neville* is to pay for the coals already delivered, I have no objection to deliver more." After this, more coals were furnished by the plaintiffs; but there had been paid £150, by three cheques of £50 each of *Neville's*, jury having found for the plaintiff on the special count. *Held*, that the Statute of Frauds was no answer to the contract alleged in that count.

Held also, that by such contract the debt of M. was, as a matter of law, extinguished.

Held also, that the count was good, and disclosed a sufficient consideration for the contract.

Held, that the amendment was properly made, and that the terms on which it was allowed by the Judge ought not to be reviewed.

Held also, that even if the count was bad for not alleging that the debt of M. was agreed to be extinguished, the objection ought not to prevail, as it had not been taken at the trial.

In an action against M. and N., who were partners, for coals sold and delivered, M. allowed judgment to go by default, and N. pleaded the general issue. At the trial, it appeared that M. was indebted to the plaintiffs for coals sold, &c., before the partnership with N. After the evidence on both sides was closed, the Judge allowed a special count to be added, which alleged that M. and N. jointly contracted to pay the debt of M. to the plaintiffs, in consideration that the plaintiffs would continue to sell coals and deliver them to M. and N.; and he permitted the defendant to plead the Statute of Frauds. The

1866.

MOREHEAD
and another
v.
McISAACS
and another.

which more than covered the amount due for such subsequently delivered coals. The defendant *Neville* was called, and altogether denied the conversation spoken of by *Mills*. It was submitted on behalf of the defendant that the plaintiffs could not recover on the declaration as framed, for the coals had been delivered to *McIsaacs*. The learned Judge allowed the plaintiffs to amend the declaration, by substituting the following count:—
“For that whereas before the making of the agreement hereinafter mentioned, the plaintiffs had from time to time sold and delivered divers quantities of coal to the defendant, *Dougall McIsaacs*, who was at the time of the making of the said agreement indebted to the plaintiffs in the price thereof; and that thereupon the defendant, *Joseph Neville*, entered into partnership with the said *Dougall McIsaacs*, and thereupon it was agreed between the plaintiffs and the defendants that, in consideration that the plaintiffs would sell and deliver to the defendants further quantities of coal, the defendants would become and be jointly liable to pay to and would pay to the plaintiffs the said amount, in respect of which the said *Dougall McIsaacs* had been solely indebted as aforesaid to the plaintiffs; and the plaintiffs aver that they have sold and supplied further quantities of coal to the defendants, and all things have been done and happened to entitle the plaintiffs to a performance by the defendants of their said agreement; yet the defendants have not paid the said amount, in respect whereof the defendant, *Dougall McIsaacs*, had been solely indebted as aforesaid.” And he allowed the defendants to plead the Statute of Frauds; both parties having permission to demur to such count and plea. After the amendment, the defendant's counsel again addressed the jury, and contended that he (*Neville*) would not be liable on such an agreement as that alleged in the amended count, unless it was in writing, as required by the Statute of Frauds. With regard to the goods supplied after the partnership, it was submitted that the plaintiffs were bound to credit the amount paid by the partnership against these goods. A verdict having been found for the amount claimed.

Darley, for the defendant, in accordance with leave reserved, obtained a rule *nisi* to enter the verdict for the defendant, or for a new trial, on the ground that the Judge should have told the jury that the Statute of Frauds was a complete bar to the plaintiffs' right to recover on the special count; and that that count disclosed no legal consideration. 2. That the Judge should not have allowed the amendment, as the effect of the amendment was to allow a demurrable count. 3. That the Judge should have ruled that all the payments by the partnership were made, and to be credited on the partnership account, and that the verdict was against evidence as to the alleged promise by the defendant *Neville*, to pay for the coals delivered to *McIsaacs*.

1866.
MOREHEAD
and another
v.
MCISAACS
and another.
March 5.

Stephen now showed cause. It is submitted that the amendment was properly allowed. [*Faucett*, J. After the amendment was allowed, I was pressed by the defendant to postpone the trial, in order that the attendance of *McIsaacs* might be procured. But I thought the defendant had come into Court prepared to contest the real point in dispute, namely, the liability for the coals delivered before the partnership. It appeared that *McIsaacs* was some distance from Sydney; that he had not been subpoenaed; that he had quarrelled with *Neville*, and might fairly be considered as an unsafe witness; and when I asked how long a postponement was necessary, the defendant's counsel said that he could not say within what time *McIsaacs* could be procured. I therefore refused to postpone the trial.] The contract alleged in the amended count and relied on at the trial, was the joint liability of *Neville* and *McIsaacs*, and the defendant demurred to this count, on the ground that such a liability was within the Statute of Frauds(a). It is submitted that an agreement to convert a separate

(a) PRACTICE.—*Stephen* proposed to read an affidavit verifying a letter from *McIsaacs* on this point.

Darley objected that it could not be received, as it had not been filed before one o'clock the day before, as required by the Rule of 5th July, 1858.

Per Curiam. The rule does not apply to rules *nisi* for new trials. But if intended to be used, the affidavit ought to have been shown to the other side.

September 17.

1866.
 MOREHEAD
 and another
 v.
 McISAACS
 and another.

into a joint debt, is not within the statute; the effect of such agreement being to create a new debt, in consideration of the former being extinguished; *Ex parte Lane (a)*, *Chitty on Contracts (b)*. In *Ex parte Lane*, Sir J. Knight Bruce says, "Such an agreement is valid and effectual, and is not impeached or affected by the Statute of Frauds. The effect of it is for a valuable consideration, to extinguish the first" (*i.e.*, the separate liability), "and, for a valuable consideration, to substitute the second" (*i.e.*, the joint liability) "for it." "In order," says Parke, B., giving judgment in *Craufurd v. Cocks (c)*, "to render the new firm liable for the amounts which do now so appear in the books, it is necessary to show that the old firm have ceased to be liable, and are discharged; and in order to do so, you must show an agreement between the old firm, the new firm and the customer, that the new firm is to be considered as substituted as the debtor in lieu of the old for the amount sought to be recovered." The separate liability of *McIsaacs* for the debt was extinguished by the acceptance of the joint liability of himself and *Neville*; and this is a good consideration; *Lindley on Partnership (d)*. The same writer says (*e*), "an agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established by indirect evidence. The Courts, it has been said, lean in favour of such an agreement, and are ready to infer it from slight circumstances." Here, the evidence shows that in each instance of payments made by the cheques of *Neville*, on behalf of the firm, the amounts paid were beyond the value of the coals delivered. The authority of the case of *Kirwan v. Kirwan (f)* is shaken by the more recent cases of *Thompson v. Percival (g)*, and *Hart v. Alexander (h)*. It is admitted that unless a substitution of liability can be established, the old liability remains; *Ex parte Whitmore (i)*. If *McIsaacs*

(a) 1 De Gex 300; 16 L.J. Bank 4.

(c) 6 Exch. 294.

(f) 2 Cr. & M. 617.

(h) 2 M. & W. 485.

(b) p. 453.

(d) p. 352.

(e) p. 317.

(g) 5 B. & Ad. 925.

(i) 3 Deac. 365.

were sued alone, these cases show that he could plead the acceptance of the joint liability of himself and *Neville*, as a discharge of his individual liability; and that discharge is a sufficient consideration for the joint liability. It will be contended that this count is demurrable, because the alleged consideration is not the sale and delivery of coals on credit. The supplying or selling of goods is not inferred to be for cash, but is impliedly on credit. And besides this the plaintiffs were not bound to deliver on sale. Therefore the agreement to deliver, as well as to sell, supports the consideration. In allowing the amendment, and in permitting the defendant to plead the Statute of Frauds, the discretion of the Judge was rightly exercised; and, at all events, its exercise will not be reviewed; *Morgan v. Pike* (a), *Buckland v. Johnson* (b), *Holden v. Ballantyne* (c).

Darley contra. The defendant came into Court believing that the plaintiffs relied on a dormant partnership. The case on which the verdict was given was an afterthought, after the Judge had intimated his opinion that the plaintiffs must be nonsuited. By the amendment the defendant was taken by surprise. For if the special count had been originally on the record, the defendant would have procured the presence of *McIsaacs*. The amendment, as a matter of discretion, ought never to have been allowed; *Garrard v. Giubilei* (d). But if allowed, the Statute of Frauds is an answer. The contract declared on by this amendment was, that the defendant *Neville*, in effect, made himself responsible for the debt of *McIsaacs*. But this contract was not in writing, and therefore was void. There was no evidence that *McIsaacs* was discharged; *Harris v. Farwell* (e). Then as to the substitution of the two debtors for the one, it was a question of fact whether there was such a substitution, and should have been put to the jury. [*Faucett, J.* The question of the discharge of *McIsaacs* was not raised either by the evidence or by the argu-

1866.

MOREHEAD
and another
v.
McISAACS
and another.

(a) 14 C.B. 473.

(b) 15 C.B. 145.

(c) 29 L.J.Q.B. 148.

(d) 31 L.J.C.P. 131.

(e) 15 Beav. 31, cited in *Lindley* 361.

1866.

MOREHEAD
and another
v.
McISAACS
and another.

ments; the only question raised was whether the subsequently delivered coals were to be delivered, on the consideration that *Neville* and *McIsaacs* should be liable for the former debt.] It is clear that *Mills* would have denied any intention of giving up the claim against *McIsaacs*. At all events the question was not considered by the jury. [*Faucett*, J. But this point was not taken at the trial. The defendant relied wholly on two points. 1st. That the new contract showed no consideration. 2nd. That if it did, yet the promise should have been in writing.] But, in truth, there was no evidence of a joint promise; the only evidence was of a promise by *Neville* alone to pay for *McIsaacs*. And the three payments by the defendants' firm should have been set against the debts of the firm—that is, against the coals supplied to the firm, and not against the coals supplied to *McIsaacs* alone. A person who is admitted as a partner into an existing firm, does not by his entry become liable to the creditors of the firm for anything done before he became a partner. The new member becomes one of the firm for the future, but not as from the past; and his present connection is no evidence that he ever authorised or ratified what has been done prior to his admission; *Beal v. Moul* (a), *Young v. Hunter* (b), cited in *Lindley* (c). In the case of provisional committees, if several members of a committee order goods, and then a new member join the committee, he is not liable to pay for the goods, although they are delivered after he joined it; *Lindley* (d). The real question is whether there is an extinguishment of the old debt. And this is a matter of fact, and not one of law; *Lindley* (e). [*Faucett*, J. Suppose the new firm agree to become liable for the old debt, in consideration that the plaintiffs give further supplies on credit (without extinguishing the old separate liability), is not that a good contract?] It is submitted that that is the present case, and that in such a case it is a contract of guarantee, and therefore must be in writing. A promise by the new firm to be liable for the debt of the old, for

(a) 10 Q.B. 978.

(b) 4 Taunt. 581.

(c) p. 315.

(d) p. 316, citing *Newton v. Belcher*, 12 Q.B. 921. (e) 360.

any other consideration than the extinction of the old debt, is a guarantee. Because both the old and new firm remain liable; and this is assumed to be the law in *Ex parte Lane* (a). In that case also, Sir *J. Knight Bruce* distinctly states that the question of extinguishment is one of fact for the jury. In this case, therefore, there must be a new trial, when the jury can pronounce their opinion on this fact. It is submitted also, that the amendment ought never to have been allowed, except on the terms of allowing the defendant an opportunity of tendering the evidence of *McIsaacs*.

1866.

 MOREHEAD
 and another
 v.
 McISAACS
 and another.

STEPHEN, C.J. I entertain some doubt; but I think that there ought not to be a new trial. It might be more satisfactory to have the opinion of the jury. But at the trial the point was not raised. I am of opinion that the amendment was properly made by the Judge, as matter of discretion, assuming that the new count allowed was itself a good one, and that the Judge had power to make it, notwithstanding the judgment by default against *McIsaacs*. *Neville* had the particulars before him, and must have known that the greater part of the coals were delivered before the partnership. The terms on which the amendment was allowed by the Judge ought not, I think, to be reviewed, unless it be clear that they (or the allowing the amendment itself) worked an injustice, and none is shown.

The new count is a good one, for the considerations stated in it for the promise averred are sufficient. I think it may be fairly inferred that the coals were to be sold on credit. The Statute of Frauds is no answer; for the promise by *A.* and *B.*, for a new consideration springing from the plaintiffs, to be jointly indebted for the separate debt of *A.*, is (it seems to me) necessarily, in point of law, an extinguishment of that separate debt. For, without a special contract to the effect (as in a bond by which two or more men may bind themselves jointly and severally), *A.* cannot be deemed twice a debtor, in his natural capacity, for the same debt. If the old debt

(a) 16 L.J. Bank 4.

1866.
 MORRHEAD
 and another
 v.
 McISAACS
 and another.

in such a state of things continued—i.e., in the absence of an agreement, that it should be extinguished—then the contract was merely on *Neville's* part a guarantee; and, as it was not in writing, it is ineffectual.

If, on the other hand, the new count be bad as it now stands, because of the absence of an allegation in it, that in fact the previous separate debt of *McIsaacs* was agreed to be extinguished, I think that the objection should now prevail. For if it had been taken at the trial, a further amendment would doubtless have been allowed; and as the fact that there was such an agreement would be fair matter of presumption, the result with the jury would in all probability have been the same.

The question as to extinguishment seems not to have been mooted at all at the trial, and therefore was not submitted to the jury. But the extinguishment (as already observed by me) was, I think, matter of inference by law.

There was, I think, sufficient evidence to justify the verdict, if the jury believed the plaintiffs' witness.

If there was no binding agreement between the parties to place the old and the newly accrued and future debts on the same footing, all payments by the firm (including the three in question) would of course go in reduction and payment of the debts of the firm, that is, of the new supplies. But if there was such an agreement, the creditor had a right to appropriate all payments as he pleased; and if he makes none, the law appropriates them to the oldest claim—that is, in this case, to the goods first supplied, and not those supplied to the firm only.

CHEEKE, J., concurred.

FAUCETT, J. No amendment ought, in my opinion, to be allowed at the trial, if it affords reasonable grounds for a demurrer. But in the words of *Williams, J.*, in *St. Losky v. Green (a)*, it is perfectly clear to me that it

is the duty of a Judge "to amend the pleadings, so as to make them suitable to the decision of that question, which the parties are contesting." He continues, "then as to the terms of the amendment, are the plaintiffs to pay costs, as contended on the defendants' part? I think not. The jury found that the defendants had not performed their contract; and it comes to this, that the defendants, not having performed their contract, must be taken to have known very well what was the real matter in dispute; and knowing that, and being aware that there was a blunder in the declaration, they sought to take advantage of that mistake to the plaintiffs' prejudice. The costs, therefore, ought not to go to the defendants." Here, I think, the real point in dispute was whether the partners were to be jointly liable for the antecedent debt of *McIsaacs*; and that the point was not in issue upon the original pleadings. I did not think it right to adjourn the case indefinitely, on account of the absence of *McIsaacs*; and I could not learn that his presence could be obtained within a reasonable time.

1866.

MOREHEAD
and another
v.
McISAACS
and another.

Rule discharged.

1866.

September 7.

PRINCE *against* NOWLAN (a).

Action on behalf of a company against a shareholder, for a call covenanted to be paid under a deed of co-partnership.

Plea—that the defendant was induced to join and to sign the co-partnership deed, because of and on the faith of certain false representations made to him by one J.G., an agent of the company; such agent having been employed to solicit co-operation, and procure subscribers. Averment, that within a reasonable time after notice of the fraud, and before he had received any benefit under the deed, the defendant repudiated his liabilities and abandoned his rights under the deed. *Held*, on demurrer, that the unauthorised fraud of such agent is a defence.

DECLARATION for that whereas an indenture was made on the 3rd of November, 1862, between the several persons whose names and seals were thereto subscribed and affixed, and thereafter designated the subscribers of the first part, and *T. S. Mort, J. F. Josephson, J. Mitchell, M. E. Murnin, and W. H. Eldred* (thereinafter designated “the said trustees,” and being five of the said subscribers—each of them acting therein in the distinct character of one of the said subscribers, and also of one of the said trustees) of the second part, and the plaintiff (thereinafter called “the said treasurer”) of the third part—by which indenture, after reciting that the parties of the first part being desirous with a view to the further development of the resources of the colony of New South Wales, and not for the purpose of private gain, that an association for the growth and cultivation of cotton in the said colony should be formed under the provisions of the Act of 26 Vic., No. 1, intituled, &c., had agreed that such association should be formed and carried on and conducted by the said trustees, and that the funds necessary to be advanced for forming and carrying out and conducting the same, should be subscribed, provided, and paid by the said subscribers, in the manner therein mentioned and agreed upon; and that by an indenture bearing even date therewith, and made by and between the said trustees, they had, under and in pursuance of the provisions of the said Act, and of the said agreement between the said subscribers, formed themselves into an association for the purpose aforesaid, under the style of the New South Wales Cotton Growing Association—the terms and provisions of which said indenture had been fully agreed to by all the said subscribers; and that the whole amount to be raised and applied for all the purposes of the said

(b) Before *Stephen, C.J., Cheeke, J., and Faucett, J.*

association, should not exceed the sum of £6000; and that the money to be actually paid, used, and applied for such purposes, should be raised by the said trustees borrowing the same from any of the Sydney Banks, or otherwise at interest; and that the said subscribers should, amongst themselves, in the proportions and in the manner therein agreed upon (and thereafter designated or referred to as subscriptions), find and provide the funds requisite to repay the money so raised or borrowed, with all interest to become due or payable for or in respect of the same, and to indemnify the said trustees from all loss or liability of loss, by reason of their so raising or borrowing the same, or of their paying or being liable to pay the same, or the interest of for or in respect thereof, or any part thereof respectively; and that it had been agreed by the said subscribers that all money to be paid by them under the agreement aforesaid should be collected by and paid to the said treasurer, his executors or administrators, to be by him or them paid over to the said trustees, and by such trustees applied in pursuance of the provisions thereof. It was witnessed that the said subscribers (each covenanting for himself and his own heirs, executors, and administrators only) should and would respectively contribute the funds necessary for carrying on the said association to the extent and in manner therein specified and agreed upon. And each of the said subscribers, for himself, his heirs, executors, and administrators, covenanted with the plaintiff, his executors and administrators, that he the said subscriber, his executors and administrators, would pay to the plaintiff, his executors and administrators, on demand, the subscription or sum of money set opposite the name of such subscriber in the said schedule thereto, either altogether in one sum or at different times, in such proportions as the plaintiff, his executors or administrators (under the direction of the said trustees, or other the trustees for the time being of the said association, or the majority of such trustees), should require and demand the same; and it was thereby declared and agreed that such demand should be good

1866

PRINCE
V.
NOWLAN.

1866.
PRINCE
V.
NOWLAN.

and sufficient, if made by the plaintiff, his executors or administrators, by letter sent through the post addressed to the subscriber, upon whom the demand should be made, his executors and administrators, at his or their last usual or known place or places of abode or business in the said colony, or in any other legal manner. Averment, that the defendant became and was a subscriber to the amount of £100, and a party to the said indenture of the first part, by causing his name to be inserted in the schedule thereof, and the said amount set opposite thereto, and by having sealed and delivered the said indenture. And that afterwards, under the direction of the trustees of the said association, the plaintiff demanded and required from the defendant payment of the sum of £40, as and being a proportion of the said sum so set opposite his name; yet the defendant did not pay the same.

Plea, that before the defendant signed the deed in the declaration mentioned, a number of persons including the plaintiff, in the city of Sydney, had already formed themselves into the association in the declaration mentioned; and that the said association, with the view of obtaining subscribers to the said association, sent one *J. Grahame* as their agent to solicit the co-operation of residents, &c., in carrying out the objects of the association, and to procure subscribers thereto. Averment, that the defendant was induced to sign the deed, and to become such subscriber as is in the declaration mentioned, by a false and fraudulent representation made to him by the said *James Grahame*, that if he joined the said association he could run no risk, because a large tract of land had been selected for the said association to the extent of about two thousand acres—and that the said land had been granted by the government to the said association, and was then in process of being conveyed to trustees for the benefit of the said association, of which trustees one *Dr. Mitchell* was one. The plea then denied the truth of these representations, and alleged that within a reasonable time after he had notice of the said fraud, and before he had received any benefit under the said

deed, he repudiated his liabilities and abandoned his rights under the said deed, and gave notice of his repudiation and abandonment thereof to the said association.

Demurrer and joinder.

Stephen in support of the demurrer. There may be a doubt if the agent made the contract for the society. But the defendant made his own contract and signed the deed. The agent was not employed to make the contract; but he was employed to solicit persons to become subscribers. Why should the society be bound by his fraudulent representations? Can it be a defence that the defendant was induced to do so by false representations of any matters, but especially of collateral matters, made by an agent? In *Udell v. Atherton* (a) (although the Court was equally divided) the principal was not made responsible for the fraud of his agent. In that case a timber merchant's traveller, with full knowledge of certain defects in a log of mahogany, induced the plaintiff to purchase and pay for it by representing it to be sound. The merchant was neither aware of the defects, nor did he authorise his traveller to make the representation. The rule is thus laid down in *Chitty* on Contracts (b)—“There appears to be a difference between a representation made by an agent which is collateral to the contract, and one which is embodied in the contract—it being necessary, in the former case, to bring home the fraud to the principal, by showing either that he authorised the misrepresentation of his agent, or that he afterwards assented thereto; whilst in the latter case, the fraud of the agent will render the contract voidable as against the principal, without its being shown that he was privy to it.” In *Cornfoot v. Fowke* (c) the principal neither made nor authorised the agent to make a false representation, and the agent, though he made one, did not know it to be false; and it was held that the facts did not constitute legal fraud. *Parke, B.*, says, “As this representation is not embodied in the contract, the contract cannot be affected, unless it be a fraudulent representation.”

(a) 30 L. J. Ex. 337.

(b) p. 609.

(c) 6 M. & W. 873.

1866

PRINCE
v.
NOWLAN.

1866.

 PRINCE
 v.
 NOWLAN.

Moreover, it is consistent with the plea that the defendant knew of the fraud when he executed the deed. [Stephen, C. J. He says that he was led to sign by the false representation, and that within a reasonable time he repudiated, &c.]

Windeyer in support of the plea. A principal who makes a contract by means of an agent is responsible for the false representation made by that agent in the making the contract. "To support," says *Parke*, B., in *Moens v. Heyworth* (a), "this action for false representation, it is essential to prove that by words or acts of the defendants, or their agents, it was made falsely, and for the improper purpose of inducing the plaintiffs to purchase." And in *Wilson v. Fuller* (b), *Tindal*, C. J., says, "Then was there a fraudulent concealment by *Wadeson* (the agent)? which, it must be admitted, would bind Mr. *Wilson*, if proved." And in *Hern v. Nichols* (c), a case which has never been questioned, Lord *Holt* held that, in an action of deceit, for selling one kind of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond the sea, the merchant was liable. If the agent had the deed in his hands, and the defendant then on his representations signed it, he may be said to have made the contract with the agent. He referred to *Ormrod v. Huth* (d), and *Addison on Contracts* (e). [Stephen, C. J. And besides, this is the case of a company suing a co-partner. On the other hand, the plea states that the association—the plaintiff being then a member—was formed before the defendant executed; and that the association so formed, employed the agent to obtain more subscribers. Is or not this in effect an agency to make contracts?]

Stephen replied.

STEPHEN, C. J. The plea is good. For in substance it alleges that the plaintiff and others had formed the

(a) 10 M. & W. 157.
 (d) 14 M. & W. 651.

(b) 3 Q. B. 77.

(c) 1 Salk. 289.
 (e) p. 634.

association, and that then the agent was employed to procure the defendant's junction and signature to the deed ; and that he was misled into those acts (in other words, to contract by covenant with the plaintiff) by false representations on the part of that agent. When the defendant further alleges, substantially, that as soon as he discovered the fraud, he repudiated the transaction,—in other words, rescinded his contract, as under such circumstances he was entitled to do,—the plea might with more precision have stated in terms that the defendant had not made the discovery when he executed the deed ; but the allegation is implied. And it makes no difference whether the deed was then and there—when the representations were made—executed, if the defendant in fact executed in consequence of and in reliance on those representations. Whether the plaintiff or the association could have been sued for the misrepresentations is a very different question ; but that is not the one which we now have to decide.

1866.
PRINCE
v
NOWLAN.

CHEEKE, J., concurred.

FAUGETT, J. I am of opinion that the plea is good in substance. A person who has been induced to enter into a contract by fraud, may, on discovering the fraud, rescind the contract. The defendant having discovered the fraud after the deed was executed, might, in my opinion, within a reasonable time, and before he had obtained any benefit under it, repudiate the contract. The plea does not, I notice, allege that the plaintiff has not incurred any loss before the alleged rescission. If in any way his position has been altered, such matter might be replied.

Judgment for the defendant (a).

(a) The plaintiff having been allowed to reply, the replication was demurred to; see next case.

1866.

December 14.

PRINCE *against* NOWLAN.

Action on behalf of a company against a shareholder, for a call covenanted to be paid under a deed of co-partnership.

Plea, that the defendant was induced to join and to sign the deed, because of and on the faith of certain false representations made to him by one J. G., an agent of the company; such agent having been employed to solicit co-operation, and procure subscribers.

Averment, that within a reasonable time after notice of the fraud, and before he had received any benefit under the deed, the defendant repudiated his liabilities, and abandoned his rights under the deed.

Replication, that before the plaintiff had any notice of such repudiation, several persons on the faith of defendant's name joined

the association, and also the plaintiff and the trustees borrowed on the same ground, for the purposes of the company. *Held* bad, as the defendant was altogether discharged, even as to subsequent shareholders.

THE demurrer to the plea having been overruled, the plaintiff was allowed to reply.

The replication was as follows:—That the said *James Grahame* never had any instructions or authority whatsoever from the said trustees in the declaration mentioned, or the said association in the declaration mentioned, or the plaintiff, to make the said alleged false and fraudulent representations in the said plea mentioned to have been made by him; and that after the defendant became a subscriber to the said association and a party to the said indenture, as in the said declaration is alleged, and before the said trustees, or before the said association or the plaintiff had any notice or knowledge of the said alleged false or fraudulent representations by the said *James Grahame*, and before the said trustees or the said association or the plaintiff had received any notice, or had any knowledge of the repudiation by the defendant of his liabilities and abandonment of his rights under the said indenture, as in the said plea is alleged, certain moneys, found to be necessary in forming and carrying on and conducting the said association, had been raised by the said trustees, borrowing the same from one of the Sydney banks, and paid, used, and applied by them for forming and carrying on and conducting the said association and otherwise; and the said trustees had thereby and otherwise incurred liabilities in and about the foundation, carrying on and conducting the said association; and that certain other subscribers to the said association executed the said indenture, subsequently to the defendant, and on the faith of his having executed the same, without any notice or knowledge from the defendant, or otherwise, of the said alleged false and fraudulent representation to the defendant by the said *James Grahame*.

Demurrer and joinder.

Windeyer in support of the demurrer. The replication states that before the plaintiff had any notice of the defendant's revocation, several persons on the faith of the defendant's name joined the association, and the plaintiff and trustees on the same ground borrowed money for the purposes of the company. As between the plaintiff and defendant, the plea is no answer to the action; and the rights of these parties are not affected by the collateral liabilities of the plaintiff and third persons. The fraud of the plaintiff's agent has rendered void the entire contract with the defendant. The fact that innocent persons have subsequently become shareholders, cannot affect the rights of the plaintiff, who, previously, was induced to become a shareholder by fraud. How can it make the defendant liable, that other persons had subsequently been misled by the innocent accession of the defendant? In *Ex parte Ginger* (a) it was held that circulars issued by the managing director of the Tipperary Bank, for the purpose of inducing persons to take shares in it, and containing false and fraudulent statements, were to be regarded as the circulars of the bank, and that persons taking shares upon the faith of them were not contributories. In that case the managing director of the Tipperary bank, acting without authority, and in violation of the bank's deed of settlement, issued a number of shares, entered them in the share register book in the name of A., and debited him with the price; of this proceeding A. was ignorant. In order to induce persons to take these shares, the director issued a flourishing report, prospectus, and balance sheet, in which there was not a word of truth; he placed these documents in the hands of a friend, who did not know them to be false, and induced him to endeavour to sell the shares. The friend in question employed agents equally innocent with himself, to induce people to take shares, and such agents were furnished with the false and fraudulent documents above alluded to. *Ginger* was induced by one of these agents, and by the false documents produced by him, to purchase shares; and

1866.

PRINCE
v.
NOWLAN.

(a) 5 Ir. Ch. R. 174.

1866.
PRINCE
v.
NOWLAN.

A. was induced by a trick on the part of the director to sign transfers to *Ginger*, who accepted the shares, and was registered as a shareholder in respect of them. *Ginger* was held not to be a contributory, because he was induced to purchase them by gross fraud, imputable to the company. *Henderson v. The Royal British Bank* (a), where the Court allowed execution to issue against a shareholder, under the 7 and 8 Vic., c. 113, is an authority that fraud on a shareholder by the directors of the company, and to which fraud the creditor is not privy, affords no defence to proceedings by such creditor against the shareholders. "Suppose," says Lord *Campbell*, when delivering the judgment of the Court, "this were a common partnership, and that there was credit given to the firm, would it be any answer to an action by a creditor against one of the partners, that the defendant was fraudulently induced by the other partners to become a partner? *Inter se*, that might be considered; but, as between the firm and a creditor, it is a matter wholly immaterial."

Stephen in support of the replication. The reason is, that new persons are come on the stage, and the plaintiff is suing for them, and for their protection. In effect, they are persons who have a fair claim on the defendant to contribute to their loss. This, moreover, is an association of a peculiar character. The defendant may sue the agent for the false representation; but he cannot withdraw to the prejudice of innocent and new partners. They are entitled to maintain their position as virtual plaintiffs, by asking why *they* are to be prejudiced by falsehoods of an agent uttered long before they were connected with the company. *Henderson v. The Royal British Bank* is an authority in favour of the replication, for the subsequent shareholders are in the position of the creditor in that case. *The Deposit and General Life Assurance Company v. Ayscough* (b) shows that, in an action for calls, a plea that the defendant was induced to become a shareholder by the plaintiffs is bad, unless

(a) 7 E. & B. 356; 26 L. J. Q. B. 112.

(b) 26 L. J. Q. B. 29.

it also avers that the defendant has repudiated the contract, and had done nothing to make himself liable as a shareholder, after he became aware of the fraud. A contract entered into by fraud, is only voidable and not void; but the election to avoid must be made before the rights of third parties are affected; *White v. Garden* (a). The doctrine of repudiation cannot prevail where a man by his own act has put it out of his power to place the parties in the same position as they were in at the time the contract was made; *Clarke v. Dickson* (b). The plaintiff may bring his action upon the case for the fraud against the agent, or those members who may be responsible for the false representation.

1866.
PRINCE
v.
NOWLAN.

Windeyer in reply. If so, the subsequent accession of one shareholder, being innocent, would wipe out the fraud of the agent—not merely for his own benefit, but the benefit of perhaps ninety-nine misrepresenting partners. Why is this defendant to be injured (deceived as he has been) in order to prevent injury to some one else, with whom he had nothing to do? (c)

STEPHEN, C. J. It is not a point easy of solution; but, on the whole, I think that the defendant is altogether discharged, even as to subsequent shareholders. If the defendant, who is sought to be made liable as a shareholder, was induced to join the company by the fraudulent representation of its agent to procure signatures, the company are bound by it; and the defendant thus induced is entitled to repudiate his engagement. But he must do so immediately he discovers the fraud. The plaintiff is suing as well for the benefit of those members who came into the company after, as for those who came in before, the defendant; and, it is said, that those members who came in afterwards, not being members when these false representations were made, and being therefore innocent of any fraud, were induced to become members by seeing the defendant's signature. It is

(a) 10 C. B. 919.

(b) 27 L. J. Q. B. 223.

(c) See *The National Exchange Co. of Glasgow v. Drew*, 2 McQueen 103; and *Nichol's* case, 5 Jur. N. S. 207, cited in *Lindley on Partnership*, bk. 2, ch. 1, s. 3.

1866.
PRINCE
v.
NOWLAN.
hard on such persons; but still I think the defendant is entitled to repudiate the contract, notwithstanding the fact that innocent persons have subsequently become members.

CHEEKE, J. I am of the same opinion.

FAUCETT, J. The Court has already held that the fraud of the agent binds the company; and, in my opinion, it binds both the members who have joined before, and those who have joined after, the defendant. I do not see how the injury which the new members have received can exempt them from a liability for which all the members are responsible (a).

Judgment for the defendant.

July 4.

ALEXANDER *against* BENSUSAN and another.

In an action by A. against B., on an agreement in the words following—

“On the assumption that the deed of assignment executed by you to us this day, contains a true and correct statement of your debts and liabilities, we hereby undertake, on the execution thereof by a majority of the creditors named in such deed, and on the same being duly registered

according to the requirements of the 5 Vic., No. 9, to pay to you the sum of £200, in addition to the sum of £45 belonging to your estate now in your possession”—*Held*, on demurrer, that the agreement disclosed no consideration for the promise.

(a) See *Sheffield's* case, 1 Johns. 451; *Richmond's* case and *Painter's* case, 4 K. & J. 305; and *Lindley* on Partnership, p. 1107.

THE declaration set forth an agreement in writing made by and between the plaintiff and the defendants, in the words and figures following—that is to say:—“DEAR SIR—On the assumption that the deed of assignment executed by you to us this day, contains a true and correct statement of your debts and liabilities, we hereby undertake, on the execution thereof by a majority of the creditors named in such deed, and on the same being duly registered according to the requirements of the 5 Vic., No. 9, to pay to you the sum of £200, in addition to the sum of £45 belonging to your estate now in your possession. Dated the 24th August, 1864.—S. A. Joseph, and S. L. Bensusan. To Alex. Alexander, Esq.”

It then alleged that the person in the said agreement addressed as “Dear Sir,” and described as “Alex. Alexander,” is the plaintiff; and the persons signing the

said agreement, as "*S. A. Joseph*" and "*S. L. Ben-
susan*," are the defendants. Averment, that although
the said deed in the said agreement mentioned, did con-
tain a true and correct statement of the debts and
liabilities of the plaintiff, and although the plaintiff pro-
cured the said deed to be executed by a majority of the
creditors named in such deed, and to be duly registered
according to the requirements of the statute, 5 Vic.,
No. 9, and although the defendants have paid to the
plaintiff the sum of £100, part of the said sum of £200,
and that all conditions, &c., had been fulfilled. Breach,
nonpayment of the residue of the said sum of £200, and
the same remains in arrear and unpaid.

1866.
ALEXANDER
V.
BENSUSAN
and another.

Demurrer and joinder.

Stephen in support of the demurrer. The declaration
does not disclose any consideration for the alleged
promise by the defendants, and is therefore bad.

Darley in support of the declaration. The agreement
deducible from this declaration is, that the plaintiff was
to get the deed of assignment executed and registered,
as the consideration of the defendants' promise. The
Court must infer that the things done by the plaintiff
were at the previous request of the defendants. [*Stephen*,
C. J. If not, the agreement set out was merely *nudum
pactum*.] This inference arises partly from the terms
of the contract, and partly from the two facts (admitted
by the demurrer to be true), though arising subse-
quently,—that the plaintiff procured the deed to be exe-
cuted and registered, and that the defendants actually
had paid him a portion of the stipulated consideration.
There is an ambiguity on the face of the agreement
which may be explained by evidence, as in *Macdonald*
v. *Longbottom* (a). He referred also to *Smith* on
Contracts (b).

STEPHEN, C. J. A contract in order to be binding
must be founded on a sufficient consideration. The

(a) 28 L. J. Q. B. 293 ; on appeal, 29 L. J. Q. B. 256.
(b) p. 45-47.

1866.

ALEXANDER

v.

BENSUSAN

and another.

declaration discloses that the deed of assignment has been executed; but that is past and gone. It may not have been executed at the request of the defendants. It has been contended that the Court must infer that the deed was to be executed and registered by the plaintiff, and that this was done by the plaintiff for the benefit of the defendants, and at their request—and that it was for this reason that the defendants have paid the £100, which sum it is alleged has been paid. But there is nothing to show that that £100 was not a gift. A request cannot be implied by reason of the existence of an executed contract. I see no reason whatever why we are to infer that the causing this deed to be executed and registered was at the request of the defendants.

CHEEKE, J., concurred.

FAUCETT, J. The consideration is past; and a promise to pay, founded on a past consideration, is a *nudum pactum*. It is clear that there is a patent ambiguity which can never be explained by extrinsic evidence.

Judgment for the defendants.

THURLOW *against* SCOTLAND.

Land under mortgage to A. was leased to B. B. mortgaged the lease to the plaintiff for

THE first count alleged that certain deeds being in the possession of the plaintiff, and the defendant being desirous of obtaining the same for the purpose of raising a sum of money, the defendant agreed with the plaintiff for £525. Afterwards, by deed, B. assigned the lease to the defendant (the plaintiff joining in the conveyance), in consideration of the payment by the defendant of £553 to the plaintiff, and of £427 to B.; these amounts remaining unpaid, but being by the deed acknowledged to be paid. On the same day on which the assignment was executed, the defendant obtained the deeds from the plaintiff, and signed a memorandum—"I have received the deeds from T. (the plaintiff) upon loan—the deed of assignment being an escrow only, until and unless I pay him £553; and in the event of my not paying the same sum to him upon request, I hold the deeds for him, and will return them to him." The plaintiff having obtained the deeds from the defendant, caused the deed of assignment to be registered, and afterwards lent them to the defendant to raise money upon them. The latter having, subsequently, paid £200 to the plaintiff, refused to return the deeds to the plaintiff, unless that amount was repaid. The plaintiff sued the defendant for a breach of the promise to return the deeds contained in the memorandum. *Held*, that he was entitled to recover substantial damages.

plaintiff, in the words and figures following, that is to say—"I have received the above deeds (meaning the aforesaid deeds which the defendant so as aforesaid was desirous of obtaining) from Mr. *W. Thurlow* upon loan, the latter (meaning one of the aforesaid deeds) being an escrow only, until and unless I pay him £553; and in the event of my not paying the same sum to him upon request, I hold the deeds for him, and will return them to him." It then alleged a request that defendant would pay the plaintiff the £553, and of nonpayment. Averment of fulfilment of conditions precedent to entitle the plaintiff to have the said deeds held for him by the defendant, and to a return of the same. Breach, that the defendant has not held the said deeds for the plaintiff, nor returned the same to him, but has wholly failed to perform his said agreement in the promises, or any part thereof. There was also a count for the conversion of certain deeds. There were other counts upon which nothing turned.

1866.
THURLOW
V.
SCOTLAND.

Pleas, to the first count—(1), that the defendant did return the said deeds to the plaintiff; (2), a rescission of the contract; to the trover count, (3), not guilty; and (4), not possessed. Issue thereon.

The cause came on for trial before *Faucett, J.*, in the November sittings in 1865, when it appeared that Messrs. *William* and *John Donaldson* were the owners of 320 acres of land at the Manning River, said to contain valuable lime-stone, subject to a mortgage by them to *T. O'Brien*, for £3000. They, on 1st January, 1862, demised the premises to one *A. Donaldson* for ninety-nine years, on a mining lease; and the latter mortgaged the lease—together with the lease of an allotment of land at Ultimo, Pyrmont, demised by *Harris* to *A. Donaldson* for fifteen years, from the 1st January, 1862—to the plaintiff, for £525 money lent. Afterwards—namely, on 1st July, 1863—by deed executed as an escrow (the money remaining unpaid, but being expressed to be paid), *A. Donaldson* and the plaintiff assigned the leases to the defendant. This assignment purported to be in consideration of

1866.
THURLOW
V.
SCOTLAND.

the payment of £553 by the defendant to the plaintiff, and of £247 by the defendant to *A. Donaldson*. It contained an absolute acknowledgment by the plaintiff, that he had received the £553. On the same day on which this assignment was executed, a schedule of the deeds was added, "relating (as it said) to the deed of assignment made between *A. Donaldson* and *William Thurlow* and *David Scotland*, bearing date 1st July, 1863." This schedule mentioned the lease of the land at Ultimo; the lease from *W. and J. Donaldson* to *A. Donaldson* of the land at Manning River; the mortgage from *Donaldson* to the plaintiff, and the assignment; and contained the following memorandum as set out in the first count, signed by the defendant—"I have received the above deeds from *Mr. Thurlow* upon loan, the latter being an escrow only, until and unless I pay him £553; and in the event of my not paying the same sum to him upon request, I hold the deeds for him, and will return them to him." On the 8th July, the defendant paid £212 10s. 6d. to the plaintiff, on account. Afterwards, it appeared that as the defendant represented to the plaintiff that he could not raise money on the deeds, unless the assignment was registered, that deed was handed back to the plaintiff for that purpose. On the 7th September the plaintiff registered it; and on the 10th, returned it to the defendant to enable him, if he could, to raise money upon it. At this time the plaintiff drew the defendant's attention to the memorandum attached to the schedule of the 1st July; and the latter said, "all right." The defendant was in fact a friend of *A. Donaldson*, the lessee and mortgagor, and not otherwise interested than as one willing to procure money to release the property from the mortgage for his friend. It appeared that certain amounts had been paid off, leaving £169 due; but the property being then unmarketable, he refused to pay any more, and refused also to return the deeds, or either of them, unless repaid £200. The defendant's case was, that the acknowledgment of the £553 by the plaintiff in the assignment deed was a mere blind, and that the real purchase was

for £212 10s. 6d., which had been paid with an understanding that if there was any profit from the speculation, but only in that event, the defendant was to be liable for the remainder. There was evidence also that the fee simple of the estate had been offered at auction without a bid being made.

1866.
THURLOW
v.
SCOTLAND.

The Judge told the jury that the circumstance, that the defendant refused to return the deeds unless he was repaid the £200, and the fact that the defendant had already paid that amount, under the contract or memorandum, might be considered in estimating the damages—that is, as tests of the value of the documents to the plaintiff. The jury accordingly found a verdict for the plaintiff for £169, with interest.

Stephen now obtained a rule *nisi* for a new trial, on the ground that the assignment, *eo instanti* by the delivery to the defendant, ceased to be an escrow, as a deed can only be an escrow when delivered to a third person; and that it became by delivery to the defendant and by registration a fully operative conveyance; and so that there could be no more than nominal damages for the breach of contract, since the defendant only refused to give up his own property. He also obtained a rule on the ground that the interest found by the jury, at all events, must be deducted, and that the tests and criteria of value mentioned in the Judge's charge were not correct.

November 27,
1865.

Sir *W. Manning* and *Butler* show cause (a). The mortgagors being in possession, granted this lease to *Donaldson*; and the lease is of some value, and will support the contract with him. If paid off, the interest would feed the estoppel, and the mortgagors would be bound to make good the lease. It is submitted that the plaintiff is entitled to recover on the agreement set out in the first count, under which the defendant holds these deeds, and which the jury have found is not rescinded. Assuming that the deed of assignment ceased to be an escrow, it did not cease to be held under that agree-

December 7.

(a) Before *Hargrave, J., Cheeke, J., and Faucell, J.*

1866.

THURLOW
V.
SCOTLAND.

ment. But it is submitted that, although as between third parties it may have ceased to be an escrow, as between the plaintiff and defendant, that consequence did not follow under the circumstances. It was also unnecessary to show the actual value of the deeds thus retained by the defendant, because the parties have dealt with the property as being of a certain value; and the jury therefore were entitled to consider it as of that value. If not of that value, why does not the defendant return them? By refusing to return them, unless paid £200, the defendant shows that he considered them of that value at any rate. Shall the defendant be allowed to retain possession of the deeds in violation of his own agreement, and then to say that he is only liable to nominal damages, because they are of no value?

Stephen contra. The plaintiff doubting the solvency of *Donaldson*, by means of the latter induced the defendant to take upon him the liabilities of this valueless property. Although it is clear that the lease being granted by the mortgagors after the mortgage, without the privity of the mortgagee, is altogether valueless, *Keech v. Hall* (a); the plaintiff, who must have known this, and who was so largely interested in the speculation, chose to act as attorney for both *Donaldson* and the defendant, and allowed the latter to become responsible, as the purchaser of such a property, for the sum mentioned in the deed. The fee simple of the property also had been put up to auction without a bid being made. It is submitted that the jury should have been directed to take all the circumstances into their consideration in estimating the damages. These deeds also belonged to the defendant, and not to the plaintiff; and the question, therefore, is what was the value of the deeds of the defendant to the plaintiff. It is submitted that if the defendant had delivered the deeds to the plaintiff, he might have immediately sued for them in trover. It is plain that if the plaintiff had sued for the price upon the deed, he must have failed, as he would have been

(a) 1 Sm. L. C. 505.

estopped by his own acknowledgment under seal; shall he then be allowed in the present action to recover the same amount as damages, because the deeds are not re-delivered to him? The plaintiff, under the first count, was bound to show, and has failed in showing, in what way he suffered damage, or lost any benefit, by not having these deeds returned. Even assuming the plaintiff was in the position of an unpaid vendor, he lost his lien when he gave up possession of the goods. *Goode v. Burton (a)* is an authority that the vendor of an estate has no lien on the title deeds after conveyance executed, for the unpaid purchase money; but the owner is entitled to such deeds. Can a person obtaining a loan of his own deeds be liable in substantial damages for breaking his promise to re-deliver them?

1866.
THURLOW
v.
SCOTLAND.

Cur. adv. vult.

STEPHEN, C. J., now delivered the judgment of the Court. February 1.

I have conferred with my brother Judges before whom this rule was argued. It appears that the plaintiff caused these deeds to be registered, and afterwards lent these deeds to the defendant, to enable him to raise money upon them, and pay off the plaintiff's mortgage. And by the written memorandum of agreement, signed by the defendant, he promised to return the deeds on demand to the plaintiff, if the amount of the mortgage money should not be repaid. On the whole, we think, first, that the plaintiff is entitled to damages for the breach of this contract, for not returning any of these deeds. The sum of £169 remains due, not having been paid, and this whether the assignment of the lease ceased to be an escrow or not. The deeds were lent to the defendant, and, therefore, whether the deed of assignment was an escrow or not, the plaintiff was entitled to recover them on failure of the payment of his balance. If by the registration the instrument became a deed, and the property of the defendant as between him and the rest of the world, it was not so as between him and the plaintiff.

(a) 1 Exch. 189.

1866.
 THURLOW
 v.
 SCOTLAND.

For the plaintiff had a right to retain the several title deeds as against the defendant, and to stipulate for their return to him by the defendant on deposit as before the loan, although they were in law, assuming such to be the law, the deeds of the defendant as against all the world beside.

Secondly, we think that the jury were justified in giving the plaintiff damages to the extent of the £169—that is, the balance of his claim on the deeds. For the property, although at present it seems of little value in the market, might become very valuable—the defendant having placed his own valuation on the deeds by refusing to deliver them up, unless paid £200, and by himself having paid off part of the mortgage debt to a larger amount. Some of us also think that the fact of £553 being named in the document as *Thurlow's* advance, is some evidence on this point. The plaintiff is clearly not entitled to interest, and the verdict will therefore be reduced by £36, and neither party will be entitled to the costs of this motion. The verdict ought to be entered on the first count only.

July 2, 5. THE MUNICIPALITY OF COOK *against* THE WARDEN
 AND FELLOWS OF ST. PAUL'S COLLEGE (a).

A proclamation constituting a municipality, under the Municipalities Act of 1858, is not invalid because in its definition of boundaries it omits a substantial portion of the land included in the petition for incorporation.

THIS was an appeal from the Metropolitan and Coast District Court.

It was an action brought to recover the sum of £54, alleged to be due to the plaintiffs, for municipal rates due in respect of lands and buildings in the occupation or possession of the defendants, situate within the municipality.

It appeared that two petitions for incorporation under the Municipalities Act, 22 Vic., No. 13, were duly gazetted on 24th June, 1862—the petition for the larger municipality, afterwards called “Cook,” being signed by 168 residents within a certain area set forth in such petition, and being partly on the north and partly on

(a) Before *Hargrave, J., Cheeke, J., and Faucett, J.*

the south side of the Parramatta Road, containing 800 inhabitants; while the petition for the smaller municipality, afterwards called "Camperdown," was signed by seventy-four residents within a certain area set forth in such petition, being on the north side of the Parramatta Road, containing 300 inhabitants; and such area being identical with the portion of the area set forth in the first petition as situate on the north side of Parramatta Road.

No counter petitions containing a sufficient number of signatures against either incorporation were presented under the second section of the Act, and consequently the usual proclamations of incorporation took place in the *Gazette* of November 13th, 1862; the only difference between the areas incorporated and those petitioned for being, that the Municipality of "Cook" included only so much of the area set forth in the first-mentioned petition as was situate on the south side of the Parramatta Road, omitting the area on the north side of that road; which omitted area was constituted into the municipality of "Camperdown," as duly petitioned for in the secondly-mentioned petition.

The defendants objected that the proclamation establishing the former municipality was illegal and void, and that no such municipality as that assumed by the plaintiffs under the name of "the Municipality of Cook" ever existed, and that therefore the defendants were entitled to the verdict. The learned District Court Judge, however, held that the proclamation in question was valid, and that thereby the municipality was duly created, and gave a verdict in favour of the plaintiffs. The question for the appellate Court was whether the direction and opinion of the learned Judge was right.

The *Attorney General* for the appellants. The question is whether an incorporation as a municipality of a portion of the area petitioned for is valid. This point at present remains undetermined, although in *Berry v. Graham* (a) an adverse expression of opinion was intimated by this Court. *Rutter v. Chapman* (b) is not an authority on

(a) February 7, 1862.

(b) 8 M. & W. 1.

1866.
The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

1866.
The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

the point. That was a case of a Charter granted by the Crown by its common law prerogative, in which case it is necessary that the charter should be accepted. But the present is a compulsory incorporation under a statute, in which a minority may be coerced. In *Rutter v. Chapman* the point was not whether the Crown could compulsorily incorporate, but whether if the Crown thought fit to grant a charter, there should also be extended to the new corporation certain powers conferred by statute. In that case a petition was not necessary with respect to any area, for the Crown can grant a charter to whom it pleases without any petition; and in the next place the charter had been accepted. "When a new corporation," says *Bosanquet, J.*, "is to be erected by the authority of the Crown, the constitution of such new corporation originates in the will of the sovereign, subject however to the assent or dissent of the new corporations by their acceptance or non-acceptance thereof. And such a grant, made by the known prerogative of the Crown, requires no petition from any particular description of persons, as a condition precedent to its validity." The Court assumed the existence of the power of the Crown to incorporate, for the common law prerogative was sufficient for that purpose, and held that the Crown could extend to the inhabitants (who were a portion of the petitioners), when incorporated, all the powers and provisions of a particular statute for the regulation of municipal corporations, the creation of some of which would not fall within the compass of the common law prerogative; as *Tindal, C. J.*, says, "the Crown may limit the grant of incorporation to the inhabitants within the same district to which the extending of the powers of the Act is directed to reach. This is no more than an exercise of a common law power in the Crown to grant the corporate franchise to any part of a district, the inhabitants of the whole whereof had joined in their petition, leaving the grantees to accept the charter or not, when granted, at their discretion." But in the present case, the question is whether the Crown may issue a proclamation of incorporation, which shall bind persons against their consent. It is evident that the same

petitioners might be willing to be incorporated with a thickly populated district, where the roads are few and easily kept in order; but unwilling to be united with a portion of that district which was thinly populated, which contained a long line of road and few valuable buildings. The present defendants may have abstained from signing a petition against the incorporation, because they understood that the proposed municipality included a particular locality. The second section of the 22 Vic., No. 13, provides that the Governor "may, on the receipt of a petition signed by not fewer than fifty householders resident within any such city," &c. How can the Government know who are resident until the area of residence is limited? The same section empowers the Government to define the boundaries of the municipality. The areas, it is submitted, are to be fixed by the petitioners, and set forth in the proclamation. The sixth section cannot cure the defects relied on in the present case. It was only intended to cure mere irregularities or omissions to comply with the provisions of the statute.

1866.
The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

Butler for the respondents. It is not compulsory on those proposed to be incorporated by a charter granted by the Crown in the exercise of its prerogative to accept the franchise. Neither is the incorporation under the Municipalities Act compulsory; for the Act provides for a counter petition. But in both cases the acceptance by the majority is binding on the dissentient minority. In the present case there was no counter petition; the incorporation was accepted; and the defendants, after acquiescence, cannot be heard to say that they refused the franchise. Why did they not, as soon as they had notice that a portion of the district included in the petition was to be cut off, present a counter petition? The same discretion is vested in the Governor as is vested in the Crown, by the 1 Vic., c. 78, s. 49; and the authority of *Rutter v. Chapman* is expressly in point. If the proclaimed boundaries were to be the same as those contained in the petition, how can the proclamation be said to "define" them? The decision in

1866.

The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

Rutter v. Chapman did not in any way turn on the question of the franchise being a common law charter. But there, as in this case, it was a question as to the construction of the somewhat similar language of a statute. The power to "define the limits and boundaries," in the 22 Vic., No. 13, s. 2, is to be interpreted in the same way as the power "to extend to the inhabitants of any such town, &c., within the district to be set forth in such charter," contained in the 5 and 6 W. IV., c. 76, s. 141. The exact point has already been decided by this Court in *Berry v. Graham* (a), and the Court must assume that the incorporation was accepted. [*Faucett, J.* If the petition is in accordance with the proclamation, the question of acceptance is immaterial, because the petition is in such case equivalent to acceptance.] He referred to *R. v. Hughes* (b).

The *Attorney General* in reply. The opinion referred to, as expressed in *Berry v. Graham*, was on a point which it was not necessary to determine, and it therefore may be reconsidered; *Ram* on Legal Judgment (c). The validity of a proclamation under this statute depends on the fact whether the proper steps have been taken. The statute was intended to call into existence bodies possessing large powers of taxation, and must therefore be strictly construed. Defined boundaries are necessary in order that those interested may know whether they are resident within them or not; and, therefore, the Legislature could never have intended to leave the question of these boundaries to be settled by the Executive, after the petitions were signed. The words "by the same or any other proclamation," favour the contention of the defendants. In the case of *In re Todmorden* (d) the power vested in the Home Secretary was to "settle" the boundaries; which implies a larger discretion than a power to define. The fact, that the portion of land omitted from the proclamation has been created a distinct municipality, shows that it is not so insignificant that the Court can throw it aside as unimportant. [*Hargrave, J.* Is not the effect of the argument for the de-

(a) 7 February, 1862.

(c) pp. 36, 182.

(b) 7 B. & C. 711.

(d) 30 L. J. Q. B. 305.

fendant to transfer to the Judges the discretion vested by the statute in the Executive ?]

Cur. adv. vult.

Their Honors now gave judgment as follows :—

HARGRAVE, J. After stating the facts as above, continued—

This case is of great general importance as affecting the legality of other proclamations of municipalities containing similar omissions of portions of the areas proposed in the petitions; and the reported cases bearing on this point are as follows:—*Rutter v. Chapman* (a), *In re Todmorden* (b), and *Berry v. Graham* (c), in this Court.

In *Rutter v. Chapman*, the validity of the English municipalities, though omitting portions of the area petitioned for, was fully established and acknowledged by all the Judges. In that case (d), Mr. Justice Coltman says :—“The incorporation of a less district than the whole of the town or borough is authorised, if within the district set forth in the charter.” So *Coleridge*, J., says (e) :—“The district need not be commensurate with the whole petitioning town or borough.” *Williams*, J. (f), is to the same effect. So also Mr. Justice Patteson (g), after discussing this question at great length, says :—“It is said that the charter is void, because it is granted to a different body of persons from those who petitioned for it; but I think it is fully warranted by the Act.” And again (h) :—“The Crown may extend the Municipal Act to the inhabitant householders of the whole borough, or of such part of it as shall be within the district set forth in the charter.” . . . “I cannot think that the Legislature intended to oblige the Crown to incorporate all the inhabitants who should petition. . . . I see no way of giving the words a reasonable construction except as empowering the Crown to extend the Municipal Corporation Act to part of the inhabitant householders. I think that the Crown may, under the 49th section of the Act, upon

1866.

The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.
July 14.

(a) 8 M. & W. 1.

(b) 30 L. J. Q. B. 305.

(c) August 12th and 14th, 1861; and February 7th, 1862.

(d) p. 40.

(e) p. 51.

(f) p. 67.

(g) p. 74-6.

(h) p. 76.

1866.
The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

a petition from all the inhabitant householders, incorporate a part, and extend the Municipal Corporation Act to that part." So Mr. Justice *Bosanquet* says (a):—"The grant may be made to the inhabitants of a limited district only, less than the whole area mentioned by the inhabitants petitioning." So *Tindal*, C. J., says (b):—"The Crown might limit the grant of incorporation to the inhabitants within the district, or to any part of a district."

Lastly, Lord *Denman* says (c):—"The proper question appears to me to be, whether the *authority of the Crown* is properly set in motion by the petition presented; and I think it is, if the inhabitant householders, i.e., a majority of them in the borough as it existed at the time of petitioning, have made the application required by the statute. The Crown is then in its charter to set out the boundaries of the projected district—a power which cannot be exercised without that of *omitting portions* from the incorporated borough."

The case *In re Todmorden* is useful as showing the power of the English Secretary of State to "settle boundaries" under the Local Government Act, 21 and 22 Vic., c. 98, secs. 16, 20; and that after such boundaries have been settled, though including areas not mentioned in the petitions, it is too late to apply for a *certiorari* to set aside the order of the Secretary of State after the inhabitants have *de facto* adopted the Act. In that case Mr. Justice *Blackburn* said:—"The Secretary of State is to settle the boundaries—an expression which may possibly import that he is not bound to accept the boundaries proposed, but *may alter them as he may be best advised*."

It was upon the authority of this most carefully considered opinion of the English Judges in *Rutter v. Chapman*, confirmed, as it seems to me, by *In re Todmorden*, that our own Supreme Court held, in the case of *Berry v. Graham*, that the omission from the proclamation of the municipality of Shoalhaven of certain portions set forth in the petition for incorporation, did not invalidate that proclamation; though the addition to that municipality of

(a) pp. 87-88.

(b) p. 103.

(c) p. 111, 112.

certain areas not set forth in such petition did render the proclamation invalid, as *ultra vires* of the Government and Executive Council. Upon this latter point the Privy Council confirmed the decision of this Court, but expressed no opinion as to the former point, upon which, in fact, there was no appeal by Mr. *Berry*, and, of course, none by the defendants. In this state of the authorities, it has been contended on this appeal—first, that the decision as to the omitted areas in *Berry v. Graham* was an *obiter dictum*, and not necessary for the judgment delivered, the Court being against that proclamation on the other objection; and secondly, that the case of *Rutter v. Chapman* has no application to this colony or the circumstances of this case. With regard to *Berry v. Graham*, the point appears to have been so clearly included in the special case that it seems impossible to treat the opinion of the Court as an *obiter dictum*; and after attentively perusing the whole of that judgment, it would seem that Mr. *Berry's* counsel abandoned this objection as clearly against him, I presume, upon the authority of *Rutter v. Chapman*. In fact, my own opinion, as I stated on the argument of the present appeal, was that this argument was scarcely allowable. But as the appellant's counsel in this case, who also argued for Mr. *Berry* in *Berry v. Graham*, stated that he did not argue in *Berry v. Graham* against the omissions, because he felt confident in his argument founded on the additions to the incorporated area, I do not think that our judicial respect for the decisions of this Court has been impaired by allowing that decision to be discussed as it has been at the bar, more especially as the present argument affects, or may affect, all our colonial municipalities, the proclamations of which since 1862, have undoubtedly all been issued on the basis of the judgment of this Court in *Berry v. Graham*.

I have now to consider the various arguments used by the appellant's counsel as to the applicability of *Rutter v. Chapman* to this colony. I am willing to admit, as argued for the appellant, that that case very much depended on the charters of incorporation being issued

1866.

THE
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

1866.

The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

under the prerogative of the Crown, valid at common law without any petition whatever preceding the charter; and I further admit that the Governor of this colony, not being specially clothed with this portion of the prerogative, *i.e.*, not being authorised by his commission to create corporations, the colonial municipalities are distinguishable in this respect from the English municipalities. The limitation of the power of a Governor under his commission is a most important constitutional principle of colonial law, and it may be as well to state that the case of *Cameron v. Kyle (a)* (not cited during this argument) clearly establishes that the "Governor of a colony is an officer of the Crown, with a limited authority; and that his assumption of an act of sovereign power out of the limits of the authority so given to him, would be purely void, and the Courts of the colony over which he presided could not give it any legal effect; and that no authority or dictum can be cited to show that a Governor can be considered as having any delegation of the whole Royal power in any colony as between him and the subject, where it is not expressly given by his commission, or implied as being necessary to the due performance of his office as Governor, or from the nature of the case incident to his functions."

Nevertheless, admitting this principle of constitutional law, I am still clearly of opinion that her Majesty, by assenting to our Municipalities Act, which by section 8 expressly confers the power of *incorporation* upon the Government, has by such section and by parliamentary authority, though not by his Excellency's commission, conferred upon the Governor her Majesty's royal prerogative or Sovereign power in this respect of incorporation, quite sufficiently to bring all our colonial municipalities within the decision of *Rutter v. Chapman*; and, therefore, within the scope of all the constitutional principles laid down by the Judges in that case as already set forth.

In fact, the proclamation declaring incorporation is essentially an act of the Royal prerogative, and, in my

(a) 3 Knapp 332 (1835).

opinion, quite as effectual to all intents and purposes as a charter from the Secretary of State's office in England, or any charter under a Governor's commission. It was argued, however, secondly, that *Rutter v. Chapman* does not apply to this colony, because the second section of our Municipalities Act differs in its words from the words of the English Act, inasmuch as the latter expressly authorises the English Corporations to be "within the district" petitioning; while the words of our Act only authorise the "proclamation to define the limits and boundaries thereof." I am inclined to concede this part of the appellant's argument so far as *Rutter v. Chapman* depended on the words of the English statute. Nevertheless, this concession is immaterial, because I am of opinion that upon the true construction of the second section of our Act, and in accordance with all the essential points of constitutional law, any omission may be lawfully made from the area petitioned for; and that the judgment in *Rutter v. Chapman* applies with full effect to our colonial Municipalities Act equally with the English Act. That is to say, I am of opinion that the petitions for incorporation are only "to set the Crown in motion,"—that these petitions themselves are, both in form and substance, documents altogether powerless, except for such statutory initiation of Executive action, which legal action is contained expressly and exclusively in the proclamations of incorporation; that the petitioners can only pray, and do only pray, the Crown "to declare a municipality under this Act;" that is to declare a municipality, and to define the limits and boundaries thereof; which limits therefore, *ex vi terminorum*, cannot be in any sense declared or defined by the petition which asked the Crown to declare and define. I am also of opinion that the true meaning of the word "define," is not to "describe," but authoritatively to mark out.

I am further of opinion that this power or authority to define the area incorporated, being entrusted to the Governor and Executive Council (the supreme Executive authority of the colony) must be held to be a *bona fide* and substantial exercise of Government authority for all

1866.

The
MUNICIPALITY
OF COOK
V.
ST. PAUL'S
COLLEGE.

1866.

The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

public purposes whatever ; and that it would be an unreasonable construction to hold that the Legislature have intended the Governor with the Executive Council merely to describe in proper surveyors' language the area set forth in the petition, as was argued in this case by the appellant's counsel.

Moreover, upon the very peculiar circumstances of this case, it might have been well argued that the two petitions and the two proclamations must be read together ; and that, as the area of the portion omitted from "Cook," being identical with the area of "Camperdown," was and is *de facto* incorporated by an admittedly legal proclamation, the petition of "Cook" was complied with by the joint effect of the two proclamations ; or, at all events, that upon all the documents before the Court there has been not so much an omission in this case of area from incorporation as the action of the Executive authority in electing between these two unopposed petitions.

Moreover, if a small portion of area petitioned for could be thus separated by a counter petition, so as to prevent the legal incorporation of the residue, it would seem to me that a new system of counter petitions not authorised by the statute would be introduced, fatal to all incorporations.

Independently, however, of all these very peculiar circumstances in this case, I would also point out (as I did on the argument), that to allow this appeal upon the objection stated would be, in effect, for the Judges of this Court indirectly to claim a power of discretion over the acts of the Executive authority ; and if the appellant's argument as to these omissions be sound, will it not follow that all the municipalities of the colony, from which any portions whatever have been omitted, will be in fact subjected to the discretion of the Judges, who may be, therefore, required from this bench to decide when the maxim *de minimis non curat lex* applies and when not ; i.e., we shall be claiming authority to estimate the proportionate parts of the areas respectively adopted or omitted by the Executive authority under this Act ; to

count up and compare the numbers of the petitioners on such respective areas, to reckon and estimate the proportionate populations of such respective areas, and to decide whether such omissions of petitioners, populations, and areas are, or are not, within the power of the Governor and Executive Council—an anomalous novelty in judicial authority so obviously contrary to all constitutional principles, that I must hesitate to commence any such system ; whatever may be the opposite dangers, if any, of allowing such discretionary authority to remain vested in the Governor, with the advice of his responsible advisers, the Executive Council, to whom all discretionary powers are constitutionally entrusted in all other cases. It must be obvious that the whole of the present difficulties, if any, may be avoided by a slight amendment of the Act, postponing the proclamation of incorporation until after a second set of counter petitions have been received and considered, upon the “defined” areas, as is done under the English Towns Improvement Act, already mentioned.

For the reasons I have stated, I am of opinion that this appeal ought to be dismissed.

CHEEKE, J. Without entering particularly into the arguments adduced at the bar, as well as the various comments and decisions now arrived at by Mr. Justice *Hargrave*, my opinion is founded (in conjunction with him) upon the decision in *Berry v. Graham*. Admitting that the point, as suggested by the Attorney-General, was not mooted or argued at the bar, in *Berry v. Graham*, yet, as the decision of the Court upon that point was not made a matter of appeal to the Privy Council, I am of opinion that it must be considered as the law of the colony ; and although the Court is now differently constituted, yet, that the decision of the Chief Justice, and the late Mr. Justice *Wise*, ought to be upheld in all its integrity until reversed. I consider that the appeal must be dismissed.

FAUCETT, J. This is an appeal from a decision of the Judge of the Metropolitan District Court, in which he

1866.

The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

1866.

The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

held that the Municipality of Cook was, under the circumstances stated in the case, duly created a municipality under, and by virtue of, the provisions of the Act, 22 Vic., No. 13.

It appears from the *Government Gazette*, of the 24th June, 1862, that a petition, under the Municipalities Act, was addressed to the Governor, signed by 168 householders, residents of Camperdown, praying for the erection of their locality into a municipality. The petitioners state that the proposed municipality contains about 800 inhabitants, and describe the boundaries of the area in which they wish to establish a municipality. These boundaries are set out by lines on the plan annexed to the case.

From the same *Gazette*, it appears that another petition under the Municipalities Act was addressed to the Governor, signed by 74 resident householders of North Camperdown, praying for the erection of their locality into a municipality. The petitioners set out the boundaries of the area, which they desire should be declared a municipality, and state that the proposed municipality contains about 300 inhabitants. The proposed boundaries are also set out on the plan.

It is admitted that the area described in the latter petition is a portion of the area described in the former one.

By a proclamation in the *Gazette* of 13th November, 1862, setting out in substance the first petition, it is declared that the Governor with the advice of the Executive Council has, in pursuance of the powers vested in him by the Act, determined to declare "such rural district" to be a municipality by the name of the Municipality of Cook; and the proclamation so declares accordingly, and then defines the boundaries of such municipality. The area, the boundaries of which are so defined, is a portion of the area described in the first petition, being less precisely by the area described in the second petition.

By a proclamation in the same *Gazette*, the area described in the second petition is declared to be con-

stituted a municipality by the name of North Camperdown.

It is clear that as the area described in the first petition contained 800 inhabitants, and as the municipality of North Camperdown—a portion of that area—contains 300 inhabitants, the Municipality of Cook, as proclaimed, contains only 500.

And the question now is whether the municipality of Cook is, under these circumstances, duly constituted; that is, whether the Governor, with the advice of the Executive Council, has power, under the statute, to constitute into a municipality, an area substantially less than that described in the petition by which the Governor is set in motion.

It was stated at an early period in the argument that the case of *Berry v. Graham* might govern this case; and having carefully considered that case, I am of opinion that the Court must be bound by it.

The plan that formed a part of the special case in *Berry v. Graham* showed two things: first, that portions of land mentioned in the petition praying for incorporation were excluded from the area proclaimed as incorporated; and, secondly, that portions of land not mentioned in the petition were included in the area proclaimed.

It is on the latter ground that the judgment of the Privy Council proceeded; but in the judgment of this Court the former was distinctly considered. The point, it is true, appears to have been scarcely, if at all, argued by the counsel for Mr. *Berry*; or, if argued, to have been very slightly pressed. But the point appears to me to have been contained in the special case, as the plan showed it, and it was distinctly referred to in the judgment; and the opinion of the Court, founded in the case of *Rutter v. Chapman*, is as distinctly expressed. (His Honor referred to the judgment and continued.) Now, whether this is to be treated as a decision of the Court upon a point distinctly before it, and requiring a decision; or a considered exposition of the law, without the necessity of an absolute decision, on a point that the case presented to the Court—and I

1866.

The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

1866.
The
MUNICIPALITY
OF COOK
v.
ST. PAUL'S
COLLEGE.

think it is either the one or the other—I am of opinion that it would not be wise now to disregard it.

Can the present case, then, be distinguished from that? I am of opinion that it cannot. The portion excluded from the proclaimed area of the municipality of Cook does not appear to be proportionately larger or more important than the portions excluded in the case of *Rutter v. Chapman*; although possibly proportionately larger or more important than those excluded in the case of *Berry v. Graham*. The difference also between an incorporation by charter under the common law power of the Crown, and an incorporation by Act of Parliament, must have been present to the mind of the Court.

I am of opinion, therefore, that this case must be governed by the judgment of this Court in *Berry v. Graham*, which stands untouched by the judgment of the Privy Council in the same case, and that the decision of the learned Judge of the District Court must therefore be sustained.

Judgment for the respondent.

June 29.

O'SULLIVAN *against* AARONS (a).

On a separate application to the Court, after an unsuccessful one to a Judge, new facts may be adduced; and the Judge's order may or may not be discharged or varied as incidental to the order of the Court.

DARLEY moved to rescind an order of *Hargrave, J.*, refusing to change the venue. He tendered additional affidavits.

Butler, who showed cause, objected to their reception.

Per Curiam. On a separate application to the Court, after an unsuccessful one to a Judge, new facts may be adduced. The fact of such previous application and its result should be brought before the Court, and all materials then before the Judge may be used again by either party, but the Judge's order may or may not be discharged or varied as incidental to the order of the Court. The mere refusal by a Judge to grant an application, is not in itself any bar to the granting of a similar application by the Court, whether on the same or on new materials.

(a) Before *Stephen, C. J., Cheeke, J., and Faucett, J.*

1866.

THE QUEEN *against* SHADFORTH (a).

March 23.

CASE reserved for the consideration of the Judges of the Supreme Court, under the 13 Vic., No. 8.

"This case was tried before me, at the Quarter Sessions held at Gundagai, February 12, 1866.

"The defendant was charged with obtaining money under false pretences.

"It appeared by the evidence, that on the 27th of November he had drawn and passed at Gundagai a cheque for £2 10s., on the Oriental Bank at Yass, stating that he had an account there, whereas he had none either then, or previously, or up to the time of his apprehension on the 31st of November (*sic*).

"The jury returned the following verdict:—'We find the prisoner guilty of drawing the cheque, but believe he intended to have provided funds to meet it, if he had had sufficient time.' It was strongly urged for the defendant, that this was equivalent to a verdict of 'not guilty,' but I refused to accept it as such, and insisted on an unambiguous verdict. The jury retired again, and presently returned a verdict of 'guilty,' coupled with a strong recommendation to mercy.

"The question for the Supreme Court is, was I right in refusing as above stated?

"H. R. FRANCIS,
Judge of South Western District."

Darley for the prisoner. It is plain, by referring to the circumstances of this case, which will not be controverted by the Crown, that there was no false pretence alleged by the prisoner. The cheque in question was drawn on the 27th November, at Gundagai, on the bank at Yass. The prisoner arrived at Yass on the 30th November, on which day (being St. Andrew's Day and a holiday) the bank was not open; and the prisoner,

A. being charged with obtaining money by false pretences, it appeared that A., on the 27th November, had drawn and passed at Gundagai a cheque on the O. Bank at Yass. The jury found that A. was "guilty of drawing the cheque, but intended to have provided funds to meet it, if he had had sufficient time." The Judge refused to accept this as a verdict of not guilty, and insisted on an unambiguous verdict. The jury retired, and presently returned a verdict of guilty. *Held*, that the first finding was sufficiently ambiguous to justify the Judge in the course he pursued, and the conviction was sustained.

(a) Before Hargrave, J., Cheeke, J., and Faucell, J.

1866.
The QUEEN
v.
SHADFORTH.

therefore, had no opportunity of paying funds into the bank to meet the cheque. The circumstances, it is quite clear, are altogether inconsistent with any fraudulent intention on the part of the prisoner, and the jury accordingly, by their verdict, intended to negative the existence of any false pretence. Their finding, however, being ambiguous in the opinion of the Judge, it was his duty to ask the jury to find specifically whether there was fraud or not, which was the material question. But, it is submitted, that by the course he pursued he altogether misled the jury. [*Faucett, J.* On the case as stated, there is no point raised as to misdirection. It must be assumed that the Judge properly directed the jury.] The verdict first delivered was clearly equivalent to a verdict of Not Guilty, and it was the Judge's duty so to enter it on the information. There was nothing improper or repugnant in the verdict, and the jury ought not to have been asked to reconsider it. The fraudulent intent is altogether wanting here, and the conviction is wrong. In the words of an American writer on Criminal Law (a), "It is a principal of our legal system, as probably of every other, that the essence of an offence is the wrongful intent, without which it cannot exist. A statute will not generally make an act criminal, however broad may be the language, unless the offender's intent concurred with his act; because the common law requires such concurrence to constitute a crime" (b); and this principle is illustrated by the cases of *R. v. All-day* (c), *R. v. Page* (d), *R. v. Harris* (e), and *R. v. Evans* (f).

Butler for the Crown. This case is governed by the decision in *R. v. Meany* (g), in which it was held that the Judge is not bound to receive the first verdict the jury give; but may direct them to reconsider it. The verdict which the jury ultimately return is the true verdict. In *Trebelcock's* case (h) the jury found certain

(a) Bishop's C. L., § 226.
(c) 8 C. & P. 136.
(e) 7 C. & P. 428.
(g) 32 L. J. M. C. 24.

(b) *Id.*, § 80.
(d) 8 C. & P. 122.
(f) 32 L. J. M. C. 40.
(h) 27 L. J. M. C. 103.

facts, and the Court were of opinion that that finding was equivalent to an acquittal. It is plain that the verdict in this case first returned was ambiguous. The prisoner was charged with obtaining money under false pretences, and the presentation of the cheque was the material point; whether that cheque was his own or another person's was immaterial. The verdict of the jury was not a finding on the issue submitted to them. How can it be material to find that the prisoner drew the cheque, and would pay it if he had sufficient time? A man might draw any number of cheques and put them in his pocket. [*Faucett*, J. The only way in which the finding was material, was as negating fraud.] It is clear that he had no funds in the bank; and if he presented a cheque and obtained money thereby, not having any funds, it is obtaining money by false pretence, as a matter of law.

1866.
The QUEEN
v.
SHADFORTH.

HARGRAVE, J. We are of opinion that the finding of the jury was sufficiently ambiguous to justify the Judge in sending them back to reconsider it.

CHEEKE, J. The case is most unsatisfactory; but I concur in the judgment just delivered.

FAUCETT, J., concurred.

Conviction sustained (a).

(a) See *R. v. Naylor*, 35 L. J. M. C. 61.

1866.

September 29.

THE QUEEN *against* CURTIS (a).

An information framed under the 73rd sect. of the Insolvent Act, which charged in the same count that the prisoner did "embezzle, conceal, retain, and remove" certain moneys, &c., is not bad for duplicity, as charging two or more distinct offences.

SPECIAL case reserved for the consideration of the Judges, under the 18 Vic., No. 8.

"The defendant in this case was tried before me at the late criminal sittings at Darlinghurst, on a charge of fraudulent insolvency.

"The information charged that the defendant did, with intent to defraud his creditors, 'embezzle, conceal, retain, and remove,' a certain part of his property.

"Mr. *Windeyer*, as counsel for the defendant, objected that the information was bad, on the ground that it charged several offences.

"I overruled the objection; but, at Mr. *Windeyer's* request, reserved the point for the consideration of the full Court.

"The sequestration of the defendant's estate was voluntary; and the defendant's petition for the sequestration of his estate, and the Chief Commissioner's order thereon, accepting the sequestration and appointing an official assignee, were tendered in evidence on the part of the Crown.

"Mr. *Windeyer* objected to the evidence, on the ground that the order was not headed 'In the Supreme Court.'

"I overruled the objection; but, at Mr. *Windeyer's* request, reserved the point for the consideration of the full Court.

"The order in fact refers to the petitioner's affidavit, which is on the back of the same sheet of paper, and is properly headed.

"The question for the consideration of the Court is, whether or not I was right in so ruling on each point?

"*PETER FAUCETT.*

"Tuesday, September 18, 1866."

(a) Before *Stephen*, C. J., *Checke*, J., and *Faucett*, J.

Windeyer for the prisoner. The information is bad, for alleging two distinct offences in the same count. For the evidence, which would support a charge of embezzling, would not support a charge of concealing, retaining, and removing; *R. v. Donohoe* (a).

1866.
The QUEEN
v.
CURTIS.

The *Solicitor General* for the Crown. The word "embezzling" must not be taken in its strictly technical, but in its wider meaning, and then there is no greater difference between it and concealing, retaining, and removing, than between the meaning of the words "destroying, defacing, and injuring" a parish register, in the case of *R. v. Bowen* (b). *Archbold's Cr. Pl.* (c) was referred to.

Cur. adv. vult.

STEPHEN, C. J., now delivered the judgment of the Court as follows:—

November 16.

The objection to the information in this case—framed under section 78 of the Insolvent Act—is, simply, that it charges the prisoner in the same one count, with (as his counsel contended) two or more distinct offences; namely, that the prisoner did "embezzle, conceal, retain, and remove" the articles in question.

Now, in the case of *The Queen v. Donohoe* (d), where the charge was that the prisoner uttered and put off a forged "order, cheque, or undertaking," the count was clearly bad for stating the offence or offences in the alternative. But we held that it was bad, also, for charging in effect as one act, two incompatible offences or matters. For, on the assumption that only one transaction was intended, the same instrument could not (we thought) be both an order or warrant for the payment of money, and at the same time an undertaking to pay that same money. On the other hand, if two transactions—or the uttering of two instruments, one an order and the other an undertaking—were intended, then the count was objectionable for duplicity. If indeed the charge had been, that the prisoner *simultaneously* uttered these two in-

(a) 1 Sup. Ct. R., C. L. 236.
(c) p. 55.

(b) 1 C. & K. 512.
(d) 1 Sup. Ct. R., C. L. 236.

1866.
The QUEEN
v.
CURTIS.

struments, it might possibly have been good ; on the authority of *The Queen v. Giddins (a)*. But the ground of our decision in *Donohoe's* case, was that which has been already stated.

Here, however, we perceive no two acts charged, which are incompatible with the idea of a single offence only—or, at any rate, with the fact of but one transaction. An insolvent may doubtless conceal or retain goods, the property of his assignee, without removing them. But if he removes the goods, intending fraudulently to appropriate them, the insolvent does by the very act retain and embezzle those goods, within the clear meaning of the statute ; and he can scarcely remove or retain goods, intending such fraudulent appropriation, without in some way (and in the fair sense of the word) concealing them. The indictment, therefore, on the authority of *The Queen v. Bowen (b)*, where the charge was of “destroying, defacing, and injuring” a parish register, is not open to objection. And the example there put by Baron Parke, of the ordinary charge in one count under the statutes against forgery, that the prisoner offered as well as disposed of and put away the instrument, cannot we think be distinguished from the present case. By disposing of or putting away the forgery, immediately consequent on the offering of it, he committed substantially but one offence ; although the acts in themselves were different. There was, at all events, or there may have been, one transaction only.

For these reasons we are of opinion that the objection here taken is invalid, and that the conviction must be sustained. We think, nevertheless, that indictments should not (where the facts are sufficiently known beforehand) be drawn in this comprehensive manner ; but that the charge of removing, where the fact is relied on, should be inserted substantively and alone in a separate count—as also, in forgery cases, where the uttering or putting away is clear, that the charge of offering merely should be omitted. For, unquestionably, each of these

(a) Carr. & Marsh. 634.

(b) 1 Car. & Kir. 512 ; and in 1 Den. C. C. 28.

several acts is distinguishable; and each may have been, for all that appears, on a different occasion. It would be better, therefore, to state in each count no more than is necessary, and really meant to be proved, in either case (a).

1866.
The QUEEN
v.
CURTIS.

Conviction sustained.

Ex parte DOOLEY (b).

October 3.

BUTLER moved to re-open and rescind a rule absolute (for an attachment for nonpayment of money under a Judge's order)—made absolute, in the first instance, on a day in this term before its extension—on the ground of irregularity. It appears that on the 4th September a summons was issued, calling on the attorney to show cause why he should not pay over an amount that had been paid to him for the applicant by the Commissioner of Railways. It appeared that the attorney had given his cheque for this amount, which had been dishonoured. The summons was served on the 5th September. The application was heard on the 11th, but was postponed till the 14th, when, there being an affidavit of service, the order asked for was made. This order was served on the 22nd, when the attorney said he was not in a position to pay the money. On the 24th, that order was made a rule of Court, and then there was a demand in the usual way. On the 28th, the motion for an attachment in the first instance was granted. The Court may rescind or vary any rule made by the Court during the same term; *Todd v. Jeffery (c)*. In that case the Court would not allow a rule of the Bail Court to be re-opened, after the term in which it was made,

A rule for an attachment for non-payment of money, under a Judge's order, is only a rule *nisi*.

(a) In the report of *Donohoe's* case, above cited, a misprint in punctuation renders one material sentence unintelligible. Instead of the words "is fatal for assuming that an instrument could be an undertaking and a cheque," &c., the text should have run thus—"I also think the second objection is fatal. For, assuming that an instrument could be," &c.

(b) Before *Stephen, C. J., Hargrave, J., and Cheeke, J.*

(c) 7 A. & E. 519.

1866.

Ex parte
DOOLEY.

even though the Judge who made it sanctioned the application. An attachment may issue in the first instance for nonpayment of costs; but only a rule *nisi* for any other kind of disobedience; *Crisp v. Groombridge* (a), *Ex parte Townley* (b). In *Ex parte Grant* (c) the rule for the attachment was made absolute in the first instance, because a clause was introduced into the order, authorising the issue of an attachment in case of nonpayment. In the present case no such clause is in the order. But the practice is now regulated by the Rule 168, Hil. T., 1858, which directs that "rules for attachments shall be absolute in the first instance, in the two following cases only; viz., first, for nonpayment of costs on a master's allocatur; secondly, against a sheriff, for not obeying a rule to return a writ or bring in the body." This rule is founded on the previous practice; and, therefore, an attachment in the first instance cannot be obtained for nonpayment of costs, and anything else; much less as in the present case, where the order is not for the payment of costs at all; *Ch. Arch.* (d).

Darley contra. It is submitted that in a case like the present, the Court exercises a very summary jurisdiction over its officers; and usually grants an attachment in the first instance. The attorney, it is clear, had an opportunity of showing cause, and had notice of all the proceedings. In *Ex parte Burgin* (e), where money had been wrongfully detained by an attorney from his client, and a rule requiring him to pay that money over had been made absolute against him, the Court granted a rule for an attachment absolute in the first instance, he not having complied with the rule—it being clearly shown that he was aware what the rule required him to do. In that case *Patteson, J.*, in the course of the argument, took the precise objection now relied on; but afterwards, on the authority of *King v. Price* (f), granted a rule absolute in the first instance. And the law is so laid down in *Lush's Practice* (g). [*Cheeke, J.* That

(a) 27 L. J. Q. B. 183.

(c) *Id.* 320.

(f) 1 Pr. 341.

(d) p. 1706.

(b) 3 Dowl. 39.

(e) 1 Dowl. N. S. 292.

(g) p. 215 [2nd edition.]

passage is omitted in the recent edition by Mr. *Dixon*.] The rule of practice relied on does not apply to cases where the Court is dealing with one of its own officers. He also referred to *Ex parte Bayley* (a).

1866.

Ex parte
DOOLEY.

Butler in reply. The rule of practice is express ; and *Ex parte Burgin* was before the rule.

STEPHEN, C. J. I am of opinion that the Court clearly may rescind and discharge, or vary any rule made by the Court during the same term. I am also of opinion that the word "affidavit," in a rule, includes in itself all annexures thereto ; and therefore a rule drawn up on reading affidavits which have annexures, implies that those annexures equally have been read. I also think it the safer course to hold that the rule of practice referred to, does apply to cases where attorneys are concerned. According to *Tidd's Practice* (b), the rule for an attachment for nonpayment of costs, pursuant to the master's allocatur, was absolute in the first instance. The rule was recognised by the Court so far back as 1758 (Trinity Term, 31 Geo. 2), as will be found in 1 Burr. 651 (c) ; and it seems to have been the practice to grant an attachment absolute, in the first instance, against attorneys, for misconduct. But the rule of Trin. 1858, is in such express terms, that I think it safer to abide by the words of the rule ; and as the present is not a case of nonpayment of costs, to set aside the rule for attachment, but without costs.

The other Judges concurred.

Rule absolute.

(a) 9 B. & C. 691. (b) [8th ed.] 486. (c) See 2 Bac. Ab. 335.

1866.

Sept. 23, 1865.

In re KIRCHNER'S Trustees (a).

The omission by an attorney who prepares a deed of assignment under the 5 Vic., No. 9, including real estate, to get the deed registered, is gross negligence; and the instrument is invalid.

M*MARTIN*, Q.C., moved to review the taxation by the Prothonotary of an attorney's bill of costs—certain items having been disallowed in connection with the preparation of a deed of assignment. It appeared that the attorney prepared a deed of assignment under 5 Vic., No. 9, including real estate, but omitted to get the deed registered—whereby, it is alleged, that assignment was inoperative, and so being valueless, the attorney can get nothing. It is submitted that the attorney has not forfeited his claim to costs against his clients, by his negligence; nor has the work done proved to be by his default valueless. *Purves v. Landell (b)*, *Bulmer v. Gilman (c)*, and *Pitt v. Yalden (d)* were referred to.

Salomons, for the trustees, showed cause. The attorney undertook to prepare a deed of assignment under the Act, and is not entitled to recover unless such a deed is prepared. The deed actually prepared was valueless to the trustees; because real estate was not bound, and the attorney is not entitled to the costs, even although he might not be liable in an action for negligence. He referred to *Hill v. Featherstonhaugh (e)*, *Lewis v. Samuel (f)*, and *Long v. Orsi (g)*.

Martin replied.

STEPHEN, C. J. I am of opinion that there was here gross negligence; for it was the attorney's duty to have seen to the registering of the deed, and if prevented from doing so by his client or any one else, he should be able to show most conclusively, and free from all possibility of doubt, that he warned the party—his client—of the fatal consequences of the omission.

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|---|--------------------|
| (a) Before <i>Stephen</i> , C. J., <i>Hargrave</i> , J., and <i>Checke</i> , J. | |
| (b) 12 Cl. & F. 91. | (c) 4 M. & G. 108. |
| (d) Burr. 2060. | (e) 7 Bing. 569. |
| (f) 15 L. J. Q. B. 218. | (g) 18 C. B. 611. |

I am also of opinion that the omission is in law fatal to the validity of the instrument. It was, therefore, useless to the trustees, and the attorney cannot recover. The rule, therefore, to review the Prothonotary's taxation will be refused, with costs.

The other Judges concurred.

1866.

In re
KIRCHNER'S
Trustees.

RANCLAUD *against* COX (*a*).

September 11.

Ex parte WALMSLEY.

THIS was an appeal against an order made by Mr. Justice *Cheeke*, whereby he set aside certain writs of execution, and among them one issued by the appellant against the property of *James Hannell*—with costs, to be paid by the appellant.

The following were the circumstances:—The appellant *Ranclaud*, having recovered a judgment against *Cox*, obtained in Chambers the usual order, under section 27 of the Common Law Procedure Act of 1857 (*b*), against *Hannell* and some others, debtors to *Cox*, for attaching all debts due to him by them; and subsequently, these debts not having been paid into Court, a similar order was obtained from a Judge, under section 29, for the issue of writs of execution against the debtors, to levy the amount of those debts, as far as they would extend, in satisfaction of the judgment. The last-mentioned order was granted, with costs, against the several debtors. Shortly after such order, but before the actual issue of any such writ, a rule *nisi* was obtained by another creditor for the sequestration of *Cox's* estate as insolvent; which rule was eventually made absolute. The sequestration having thereby been finally adjudged, the question arose whether the writs ought or not to be set aside; the debts to *Cox*, the amount of which they

The service of an order of attachment obtained by a judgment creditor, A., under the 27th section of the Common Law Procedure Act of 1857, against a garnishee, B., attaching debts due by B. to C., does not bind such debts as against B. and C., so that A. thereby acquires a "security or lien" within s. 39 of the Insolvent Act. Where the judgment creditor had obtained such an order, and before execution issued against the garnishee, the estate of the judgment debtor was sequestered, passed to the

Held that, as by the sequestration the debt due by the garnishee judgment debtor's assignee, the order of attachment ought to be set aside.

- (a) Before *Stephen*, C.J., *Cheeke*, J., and *Faucett*, J.
(b) 20 Vic., No. 31.

1866.
RANCLAUD
V.
COX.

were issued to levy, having, it was contended, vested by the sequestration in his official assignee, as part of the insolvent's estate.

Stephen for the judgment creditor. The question is whether a Judge's order, under section 27 of the Common Law Procedure Act of 1857, attaching a debt of the garnishee due to the judgment debtor, will operate in the creditor's favour against, and override, a subsequent sequestration of the debtor; in other words, whose title to the debt shall prevail, that of the judgment creditor or that of the official assignee? It is admitted that in England, under the Bankruptcy Act, 12 & 13 Vic., c. 106, the bankruptcy overrides the attachment; *Holmes v. Tutton* (a). But that decision is based on a ground inapplicable to the present case; in fact, it decides that this charge is a security within section 39 of the local Insolvent Act. Under section 184 of the 12 & 13 Vic., c. 106, creditors having security for their debt, or having made any attachment by virtue of any local custom, are placed in the situation of the general unsecured creditors, and are to come in *pari passu* with them, except in respect of an execution served and levied by seizure and sale upon, or (in respect of) any mortgage of, or lien upon, any part of the property of the bankrupt. That is, no creditor having a security for his debt shall receive more than his rateable proportion, unless it be a mortgage or lien. If he has a mortgage or lien, he has a preference, but not if he has merely a security. The Court held that a creditor having served an order of attachment, had a security, but not a lien. But under section 39 of the Insolvent Act, any creditor holding "any security or lien upon any part of the insolvent's estate" shall put a value upon such security, and deduct such value from the debt proved by him. *Holmes v. Tutton*, therefore, is an express authority for calling this charge a security. [*Faucett, J.* If under section 39 a creditor is entitled to value every security, he would be entitled to value a

- (a) 5 E. & B. 65; 24 L. J. Q. B. 346.

promissory note.] A promissory note is not a security or asset; and a creditor holding a promissory note can recover against the indorser, and prove for the balance. It is submitted that the official assignee claims under the insolvent debtor, and he takes subject to the right of the debtor in whose favour this order for attachment was made.

1866.
RANCLAUD
v.
Cox.

Butler, contra. The sequestration passed the debt due to the insolvent to his assignee, notwithstanding the order for attachment. In this case, the writ of execution was issued under it *after* the rule *nisi* for the sequestration. But the law is, it is submitted, the same whether it was issued before or after that event. The principle of *Holmes v. Tutton* has been extended in the recent case of *Tilbury v. Brown (a)*, which shows that, until payment or execution levied, the order is merely a security for the debt. The 80th section of the Insolvent Act provides that further execution of any judgment or process against the person or estate of any insolvent shall, after any order of sequestration, &c., be stayed, and the judgment debtor shall prove and take rateably with the other creditors; and where any property "has been attached by any legal process for satisfaction of any judgment, and has not been sold," such property shall pass as the rest of the insolvent estate. Considering this provision, it is clear that the security mentioned in section 89 can only be some security then known to the law, some security in the nature of a mortgage or lien which can be valued or assigned. *Miller v. Mynn (b)*, *Hough v. Edwards (c)*, were referred to.

Stephen, in reply. The order of *Cheeke, J.*, is wrong; for it directed the *fi. fa.* to be set aside, and the amount to be brought into Court, without giving any direction as to the costs which were ordered to be paid by the order for attachment. But the *fi. fa.* is valid, at all events, as to the costs so ordered to be paid.

Cur. adv. vult.

(a) 30 L. J. Q. B. 46.

(b) 28 L. J. Q. B. 324.

(c) 26 L. J. Ex. 54.

1866.
 RANCLAUD
 v.
 COX.
 September 14.

The judgment of the Court was now delivered by STEPHEN, C. J. After stating the facts of the case as above, continued: That question, in effect, as it appears to us, depends on this; whether the original order, attaching those debts for *Ranclaud's* benefit, or, rather, the service of it on the garnishees, then *Cox's* debtors, so bound those debts in their hands, as against them and him, that the creditor thereby acquired a "security or lien" on such debts, within the intent and meaning of section 39 of our Insolvent Act; for, if not, the debts certainly passed to the Assignee, unqualifiedly, as part of *Cox's* estate—notwithstanding the subsequent order, or any writ issued under it, to enforce payment to the creditor. The debtors, consequently, would be bound to pay the assignee, and not that creditor. And we are of opinion, on the whole, although the question is by no means free from doubt, that the plaintiff *Ranclaud* acquired no such lien or security; but that the debts attached passed, upon *Cox's* sequestration, to the assignee.

The 28th section of the Common Law Procedure Act, framed in the same words as section 62 of the English statute, enacts simply that service of the Judge's order shall "bind" the debt attached. Now the case of *Holmes v. Tutton* (a) decides that, although the judgment creditor thereby acquires a "security" over the debt so attached, he is in no better position with respect to it than he would occupy, if the debt were a tangible chattel, after a writ of execution binding it in the hands of the Sheriff. Lord *Campbell* says, "We construe the word 'bind' as not changing the property, or giving even an equitable property, either by way of mortgage or lien, but as putting the debt in the same situation as goods, when the writ is delivered to the Sheriff. We take the word to mean that the debtor, or those claiming under him, shall not have power to convey, or do any act, as against the right of the party in whose favour the debt is bound; and we construe it as not giving any property in the debt, in the nature of a mortgage or lien, but a mere right to have the security enforced."

(a) 5 E. & B. 80.

If this be the only effect of the enactment itself, which creates the security, it is not easy to see how the same security can have a more extended operation under a previously passed statute. In the passage cited, no reference is made to the English Bankrupt Act—the 184th section of which stands, it is said, in contrast with section 39 of our own. Lord *Campbell* admits, in another portion of his judgment, that the Common Law Procedure Act creates a “security” within the meaning of that 184th section. But he shows here what that security amounts to. It is a right to enforce payment, as against the judgment debtor and those claiming under him; but the order conveys no title or property whatever, legal or equitable. The creditor stands in the position merely of one who has lodged an execution against that debtor.

1866.
RANGLAUD
v.
COX.

What different effect then is given by our Insolvent Act? The 39th section enacts, that “in case any creditor shall hold any security or lien for payment of his debt, upon any part of the insolvent’s estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for the balance,” &c. Then follows a provision, giving to the assignee the option of “taking an assignment of the security” on payment of such value, which, for that purpose, is to be estimated on oath. If, however, the passage cited from *Holmes v. Tutton* be law, the creditor here cannot strictly be said to “hold” any security. That which he has, even (if in any sense) it conveyed an interest in the debt attached, is operative only against the insolvent and those claiming under him. But assignees, under our Insolvent Act, claim, in cases of this nature, adversely to the insolvent, or, at least, by title paramount. The creditor’s security here, whatever it may be, is statutory; and the statute confers on him no title of any sort. How then, although possibly the debt, or this peculiar species of security, might be *valued*, could either be *assigned*?

We then turn to section 30 of the same Act, and there find it enacted, that further execution of any

1866.
RANCLAUD
V.
COX.

judgment or process against the estate of an insolvent shall, on lodging the sequestration order with the Sheriff, be stayed, and that, where any property of insolvent has been "attached by legal process, for satisfaction of any judgment, and has not been sold," such property shall be placed under sequestration in the "same manner as any other part" of the estate: so that (it being in the former case expressly so enacted) the Legislature clearly meant to compel a *rateable* distribution, and prevent preferential payments in all cases of execution, or other similar process against an insolvent's property, notwithstanding its seizure, unless by actual sale. Now, certainly, the writs issued in this case against the garnishees, *Hannell* and others, are not against any portion of the insolvent's estate, and so are not within the terms of the section; but the Judge's order, attaching the debts in their hands, may be deemed "legal process" within those terms, as well as within the intent and meaning of the enactment. The debts themselves were, of course, part of *Cox's* estate and property, and therefore might be distributed as such under his insolvency. Why then should they not be so distributed? It would be passing strange, considering the object which the Legislature had in view, as disclosed by this 30th section, if process (by execution or otherwise) against an insolvent's *goods* were stayed by his bankruptcy, while an analogous process against *debts* due to him, being equally part of his estate, was permitted to be enforced.

For the reasons given, we think that the writs of execution in this case were properly set aside, and not unjustly with costs—however hardly this portion of the order, all things being considered, may be felt to operate. We say nothing as to the costs awarded by the previous order, because that order is not now before us; but, if the writs be voidable as a statutory remedy, they cannot be supported in part as process to enforce the payment of costs merely.

Judgment accordingly.

1866.

O'SULLIVAN and another *against* AARONS (a).

September 12.

FIRST count; For that the plaintiffs offered, and the defendant agreed to accept, the price of 87s. 6d. per head for certain cattle of the defendant's, consisting of 2500 head, more or less, of equal sexes, two to seven years old, free from stags, deformed, or worn-out cattle, and to be delivered at Condoblin between the first day of February and the first day of April, in the year 1865, weather permitting; payment for the same to be made by the plaintiffs on delivery in half cash, and the residue by their promissory note at six months; vendor to agree to inoculate the said cattle (if not already done) the first available opportunity, should the said cattle become infected with pleuro-pneumonia after leaving vendor's station. Averment of the fulfilment of all conditions precedent. Breach, non-delivery of the cattle within the time limited by the agreement.

Second count; For that after the accruing of the causes of action in the first count mentioned, it was mutually agreed between the plaintiffs and the defendant (but without prejudice to the said causes of action) that in consideration that the plaintiffs would accept 784 head of cattle, being part of the number of 2500 head of cattle in the first count mentioned, and would pay for

The first count set out a contract, dated 17th November, 1864, to deliver 2500 cattle between the 1st February and 1st April, 1865, at a certain price and place. There having been only a partial delivery and payment, the second count alleged an agreement by the defendant to pay all damages for his breach (including the difference in price between the defendant's agreed price and an increased price which the plaintiffs would have obtained by re-sale to B.), and to deliver

the remainder of the cattle at the former price, but in an extended time and at a different place.

Plea to the second count, after setting out the agreement of 17th November, 1864, as declared on in the first count, stated that the contract sued on in the second count was as follows:—"April 28, 1865. I (the defendant) have this day received from D. & S. O'S. (the plaintiffs) £735, and their acceptance at six months for the like sum, in payment for 784 cattle delivered to them this day, being part of the number of 2500 cattle sold to them as per contract of 17th November, which said number of 2500 were to be delivered on 1st April last. The Messrs. D. & S. O'S. in taking delivery of the present number, 784, I acknowledge, I have not in any way prejudiced their right to any action, &c., for breach of contract. I now promise, &c., to fulfil the remainder of that contract within one month from this date, by delivering 1716 cattle, according to the contract of 17th November, at C. (a different place from that named in the former contract), and hereby certify that I will indemnify the said D. & S. O'S. for any loss or consequence that may accrue to them through my breach of contract, through cattle being delayed in delivery to B. I make myself liable for the difference of price paid by D. & S. O'S. to me, and that paid by B. to them." *Held*, on demurrer to the plea, that no consideration moving from the plaintiffs appeared for the second contract; and that the defendant was entitled to judgment.

(a) Before *Stephen*, C. J., *Chees*, J., and *Faucett*, J.

1866.
O'SULLIVAN
and another
v.
AARONS.

the same by their cheque for the sum of £735, and their acceptance for the like sum at six months, the said defendant agreed to deliver the said cattle, and, further, that he would, within a month from the date of the agreement herein secondly mentioned between him and the plaintiffs, fulfil the remainder of his contract in the first count mentioned, by delivering 1716 head of cattle according to the said contract, but such delivery to take place, not at Condoblin aforesaid, but at Cudgelligo station (the station of the plaintiffs); and, further, that he would and should indemnify the plaintiffs for any loss or consequence that might accrue to them from his breach of contract, through cattle being delayed in delivery to Messrs. *Robertson* and *Broomfield*, of Colac, in Victoria, and that he (the defendant) would be liable for the amount of difference of price to be paid by the plaintiffs to him and that to be paid by the said Messrs. *Robertson* and *Broomfield* to the plaintiffs. Averment of the fulfilment of all conditions precedent. Breach, non-delivery within a month of the 1716 cattle, or at any time; nor did the defendant indemnify, &c.

Plea to the second count stated that the agreement in the first count sued upon was and is in the words and figures following, that is to say:—

“Sydney, 17th November, 1864.

“*J. Brewster*, Esq. Dear Sir,—We hereby offer you thirty-seven shillings and sixpence (37s. 6d.) per head for Mr. *Joseph Aarons*' cattle, consisting of 2500 head, more or less, of equal sexes, two to seven years old, free from stags, deformed, or worn-out cattle, and delivered at Condoblin between 1st February and 1st April, 1865, weather permitting, payment for same being made on delivery by us in half cash, and residue by our promissory note at six months; vendor to agree to inoculate the said cattle (if not already done) the first available opportunity, should the said cattle become infected with pleuro-pneumonia after leaving vendor's station.

“D. & S. O'SULLIVAN.”

“I agree to the above.

“J. AARONS, Junr.”

Averment identifying the signatures of the parties. The plea then stated that the agreement sued upon in the second count was as follows :—

“ Condoblin, April 28th, 1865.

“ I have this day received from Messrs. *D. & S. O'Sullivan* their cheque for the sum of £735, and their acceptance at six months for the like sum, in payment for 784 head of cattle delivered to them this day, being part of the number of 2500 head of cattle sold to them as per contract dated 17th November, which said number, 2500, were to be delivered here on 1st April last. The Messrs. *O'Sullivan*, in taking delivery of the present number (784), I acknowledge I have not in any way prejudiced their right to any action they may think proper to enter against me for breach of said contract. I now promise and hereby bind myself to fulfil the remainder of that contract within one month from this date, by delivering 1716 cattle, according to the contract dated 17th November, at Cudgelligo station (the station of the Messrs. *O'Sullivan*); and I hereby certify that I consider myself responsible to, and will indemnify, the said Messrs. *O'Sullivan* for any loss or consequence that may accrue to them through breach of contract, through cattle being delayed in delivering to Messrs. *Robertson* and *Broomfield*, of Colac, in Victoria. I will and do make myself liable to the amount of difference of price paid by the Messrs. *O'Sullivan* to me and that paid by Messrs. *Robertson* and *Broomfield* to them, it being unnecessary to name that sum at present.

“ JOSEPH AARONS, Junr.”

Averment, that the said persons in the said agreement described as Messrs. *D. & S. O'Sullivan* and the Messrs. *O'Sullivan*, are the plaintiffs, and the person signing the said agreement as *Joseph Aarons, jun.*, is the defendant; and that the contract in the said agreement referred to as being dated the 17th November, is the same contract as is declared upon in the said first count, and as is first set out in this plea; and that, in order to deliver the said cattle at Cudgelligo, the place mentioned in the said contract secondly set out in this

1866.
O'SULLIVAN
and another
v.
AARONS.

1866.

O'SULLIVAN
and another
v.
AARONS.

plea, the said cattle would have to be travelled a much greater distance than if they were to be delivered at Condoblin, the place mentioned in the said contract first set out in this plea ; and that, at the time of the making of the contract first set out in this plea, the defendant had no notice or knowledge of the alleged contract between the plaintiffs and Messrs. *Robertson* and *Broomfield*, which contract is referred to in the said contract secondly set out in this plea.

Demurrer and rejoinder.

Butler in support of the demurrer. The first count of the declaration is by a purchaser against his vendor, on an agreement to sell 2500 cattle at £1 17s. 6d., to be delivered between the 1st February and 1st April, 1865, at Condoblin ; and alleges as a breach, that the defendant did not within the time deliver certain of the cattle. The second count alleges, that, after the accrual of the causes of action in the first count mentioned, it was agreed between the parties, without prejudice to such causes of action, that the plaintiffs would accept certain other cattle and pay for them, and the defendant agreed to deliver the said cattle—within a month to fulfil the residue of the contract by delivering at Cudgelligo—to indemnify the plaintiffs against any loss occasioned by the breach—and to be liable for the amount of difference to be paid by the plaintiffs to him and to be paid by *Robertson* and *Broomfield* to the plaintiffs. The sixth plea sets out the agreement of 17th November, 1864, relied on in the first count ; and also the agreement of 28th April, 1865, relied on in the second count. It is submitted that the latter agreement is a new contract founded on a new and sufficient consideration, and that therefore the second count is good, and the plea is bad. He referred to *Cuthbertson v. Irving* (a), *Banks v. Angel* (b), *Edwards v. Chapman* (c), cited in *Bullen and Leake's* *Precedents* (d).

(a) 28 L. J. Ex. 306.
(c) 1 M. & W. 231.

(b) 7 A. & E. 853.
(d) p. 569.

Darley in support of the sixth plea. It is submitted that the second count of the declaration is good, and that the sixth plea is bad. The demurrer admits the truth of the plea; and, therefore, that the second agreement of April, 1865, in the plea, is the agreement in the second count mentioned. But this agreement does not tally with the count; for there is nothing in the agreement about the acceptance of the 784 head of cattle, and payment for the same being a consideration for the defendant's agreement. The necessity of setting out the agreement in the plea arose from the way in which the consideration is alleged in the second count. The averment in the count is not supported by the agreement. The course pursued by the defendant is suggested in *Bullen and Leake's Precedents* (a). Because the other side are then compelled to demur, and the party pleading thus gains the advantage of objecting upon the argument to the defective pleading of the other side, with the benefit of his own allegations. *Williams v. The Great Western Railway Company* (b) is an example of such pleading. [*Faucett, J.* There is no allegation that the plaintiffs accepted the agreement.] There is no consideration whatever for this agreement; there is no benefit to the defendant, and no detriment to the plaintiffs. There is no forbearance from suing; on the contrary, the right to sue is expressly reserved. In *Smart v. Chill* (c), the declaration alleged the defendant, who was an attorney, to have been guilty of negligence, and, in consequence, that the plaintiff was compelled to pay £14 costs, and, in consideration of the premises, promised to pay the sum of £7, half of those costs; and it was held to disclose no sufficient consideration moving from the plaintiff to the defendant, as it did not allege a release of action for the negligence. So here there is merely a substitution of one remedy for another; *Edwards v. Baugh* (d), *Rann v. Hughes* (e), *Jones v. Ashburnam* (f), and *Chitty on Contracts* (g), were referred to. The defendant was not liable for the damages

1866.

O'SULLIVAN
and another
v.
AARONS.

(a) p. 691.

(c) 7 Dowl. 781.

(e) 7 T. R. 350.

(b) 10 Exch. 15.

(d) 11 M. & W. 441.

(g) pp. 26, 44.

(f) 4 East 455.

1866.

O'SULLIVAN
and another
v.
AARONS.

to be paid to the sub-vendees, and there is no consideration for undertaking such liability; *Hadley v. Baxendale* (a). The law on this point has been recently discussed in *Williams v. Reynolds* (b); where it was held, that, on a contract to sell cotton of a certain quality at a certain price, to be delivered at a future time, the measure of damages for non-delivery is the difference between the contract price and the market price at the time limited for delivery; and the buyer cannot recover for the loss of profit which he would have made by carrying out a re-sale at a higher price made in the interval between the contract and the time of delivery; *Sykes v. Dixon* (c), and *Mayne on Damages* (d), were referred to.

STEPHEN, C. J. I am of opinion that the second count is bad, because no consideration moving from the plaintiffs appears for the new contract. The original contract, as set out in the first count, was a contract to deliver cattle at a certain price and within a stated time. There having been a partial performance, the defendant, by the agreement of 28th April, 1865, agreed to pay all damages for his breach (including the difference in price which the plaintiffs would have obtained by a re-sale to *Robertson and Broomfield*), and to deliver the remainder of the cattle at the former price, but in an extended time and at a different place. But there is no allegation that the plaintiffs agreed to take these; still less to pay for them. It appears that there was an acceptance by the plaintiffs of, and payment for, part of the cattle, after breach of the first contract. But this transaction clearly has reference to, and the cattle formed part of, the first contract. The defendant then sets out, in his sixth plea, the original and the second agreement (both being in writing) in words, by which it appears, in my opinion, that all the contract on the second occasion was on one side. For there is nothing in the writing to show any contract whatever on the part of the plaintiffs; so that the second count is not helped by the plea which alleges

(a) 9 Exch. 341.
(c) 9 A. & E.

(b) 34 L. J. Q. B. 221.
(d) p. 18.

that the writings set out constitute the contract between the parties. So that, on the whole, no consideration whatever appears for the defendant's new contract; and he is therefore entitled to judgment.

1866.
O'SULLIVAN
and another
v.
AARONS.

CHEEKE, J. I am of the same opinion.

FAUCETT, J. I think the second count is clearly bad, for there is no averment of an acceptance of the second contract by the plaintiffs. The second contract is unilateral.

Judgment for the defendant.

STENHOUSE and another *against* HARDIE and another (a). September 7.

DECLARATION; For that before and at the times of committing the grievances hereinafter mentioned the plaintiffs were seised and possessed of a certain messuage and premises, with the appurtenances, situate in Pitt-street, in the city of Sydney, and known by the name of the Sydney Mechanics' School of Arts, and the defendants were possessed of certain premises adjoining, upon which were and are erected a certain steam-engine and machinery, and the defendants for a long time worked and continued from time to time to work the said steam-engine and machinery, and thereby wrongfully and injuriously made and caused to be made a loud noise and din, to the great nuisance of the plaintiffs, so that thereby the plaintiffs were greatly disturbed, annoyed, and inconvenienced in the use, enjoyment, and occupation of their said messuage and

Declaration by the President, senior Vice-president, and Treasurer, for the time being, of the Sydney Mechanics' School of Arts, for that the defendants, who occupy the adjoining land, on which a steam flour mill is erected, have rendered the buildings of the Society useless for those purposes, and deprived the plaintiffs of the profit

which they were accustomed to obtain, from hiring the room for lectures and similar public entertainments therein, by making loud noises with the machinery of the mill, to the annoyance and disturbance of the plaintiffs, and all persons permitted to resort to the said buildings.

Plea, by way of equitable defence, that the defendants' lessor—they being tenants of the premises for a term of years—erected the mill, and put up the machinery, with the consent of the then office-bearers of the Society, they, and also the plaintiffs, having notice that the working of that machinery would necessarily produce the noises complained of. *Held*, on demurrer, bad.

(a) Before *Stephen*, C.J., *Cheeke*, J., and *Fauzett*, J.

1866.

STENHOUSE
and another
v.HARDIE
and another.

premises, and were hindered and prevented from using the same as they otherwise lawfully might and would have done; and divers persons whom the plaintiffs from time to time permitted to have access to and the use of the said messuage and premises, or part thereof, were greatly disturbed, annoyed, and incommoded in the use and enjoyment of the same; and by means of the said grievances the said messuage and premises of the plaintiffs became and were greatly deteriorated in value, and the plaintiffs, who theretofore had been accustomed to and did from time to time let the use of the said premises for hire and reward to the plaintiffs in that behalf, for the purposes of public lectures and entertainments and otherwise, were prevented from so letting the same as they might and would otherwise have done, and were deprived of the gains and profits they might and would have otherwise derived. And the plaintiffs claim £1000. And the plaintiffs also claim a writ of injunction to restrain the defendants from the continuance and repetition of the injuries above complained of, and the committal of other injuries of a like kind relating to the same right.

Plea, by way of equitable defence, that the plaintiffs were, at the commencement of this suit, the President, senior Vice-President, and Treasurer of the Sydney Mechanics' School of Arts, for the time being; and that as such President, senior Vice-President, and Treasurer, they were, at the commencement of this suit, seised and possessed of the messuage and premises, with the appurtenances, in the declaration mentioned, under and by virtue of an Act of Council passed in the sixteenth year of her Majesty the Queen, and intituled "An Act to enable the President, senior Vice-President, and Treasurer of the Sydney Mechanics' School of Arts to sell the land belonging to the Institution in George-street South, Sydney, and to purchase other land and erect new buildings in connection with the objects of the said Society in a more convenient situation," and for other purposes therein mentioned; and that, before the committing of the said alleged

grievances, one *George Wilkie* was seised and possessed of the premises now in the occupation of the defendants, and that the said *George Wilkie*, being so seised and possessed of the said premises, did erect thereon a certain flour mill, with the appurtenances, and did place therein the said steam-engine and machinery in the declaration mentioned, and which were and are necessary for the proper working of the said flour mill, and did expend large sums of money in so erecting the said flour mill and in so placing the said steam-engine and machinery therein; and that the alleged loud noise and din in the declaration complained of, was and is caused by the necessary and proper working of the said steam-engine and machinery, in and about the manufacture of flour in the said mill; and that the persons who were for the time being the President, senior Vice-President, and Treasurer of the School of Arts, at the time the said flour mill was erected, and at the time the said steam-engine and machinery were placed therein, and also the plaintiffs, had, at the time aforesaid, notice of the erection of the said flour mill, and of the placing of the said steam-engine and machinery therein, and had also notice that the necessary and proper working of the said steam-engine and machinery would cause the noise and din complained of. Averment, that the said *George Wilkie* erected the said flour mill, and placed the said steam-engine and machinery therein, and did expend the said large sums of money as aforesaid, with the knowledge, acquiescence, and consent of the said persons, who, at the time of such erecting and the placing of the said steam-engine and machinery as aforesaid, were for the time being such President, senior Vice-President, and Treasurer, and on faith that the said persons who were such President, senior Vice-President, and Treasurer so knew of and acquiesced in and consented to the said *George Wilkie* so erecting the said flour mill, and so placing the said steam-engine and machinery therein, and expending such sums of money as aforesaid, and knew of and acquiesced in and assented to such steam-engine and machinery being worked—

1866.

STENHOUSE
and another
v.
HARDIE
and another.

1866.

STENHOUSE
and another

v.

HARDIE
and another.

which said working necessarily causes the grievances complained of; and that after the said erection of the said flour mill, and the said placing of the said steam-engine and machinery therein, and after such knowledge, acquiescence, and consent as aforesaid, and after the said steam-engine and machinery had been worked for a long time, the said *George Wilkie* demised to the defendants, and the defendants relying upon such knowledge, acquiescence, and consent, leased from the said *George Wilkie* the said flour mill, steam-engine, and machinery, and by virtue of such demise and relying upon such knowledge, acquiescence, and consent as aforesaid, the defendants entered into possession of the said flour mill, steam-engine, and machinery, and worked the same in the same manner that the said *George Wilkie* had, after such knowledge, acquiescence, and consent, and before such demise, worked the same, and not otherwise—and that the alleged grievances arise from the necessary and proper working of the said steam-engine and machinery, and not otherwise.

Demurrer and joinder.

Stephen in support of the demurrer. The consent to the continuing of the noise to any extent, and at all hours, cannot be a binding consent; nor can it enure for the benefit of succeeding tenants. In any event it cannot bind the now officers and members of the School of Arts, which is a public institution. The officers can give no such consent. Nor will the present officers or members be prejudiced by the laches of their predecessors.

Darley in support of the plea. The plea is good, and is similar to that in *Davies v. Marshall* (a). These persons having lain by, have, in effect, allowed passively the erection, and therefore the using, of the engine. The plaintiffs must necessarily, as owners of the soil, succeeding to the position and duties of their predecessors, be bound (and the land is bound) by their acts and consent. Where a man lies by while a nuisance is

(a) 31 L. J. C. P. 64.

being erected, and so permits, and, as it were encourages its erection, he cannot afterwards complain ; but, on the contrary, equity will restrain the action at law ; *Williams v. Earl of Jersey* (a). It has even been held that it was the duty of the person seeing the nuisance in progress to give notice of his intention to object ; *Jones v. Royal Canal Co.* (b), *Dann v. Spurrier* (c), *Story E. J.* (d). Even a *cestui que trust* may be affected by acquiescence, *Lewin* (e) ; and a public and fluctuating body, as parishioners, may be bound by acquiescence ; *In re Chertsey Market* (f), *Edenborough v. Archbishop of Canterbury* (g). Here the acquiescence with knowledge is admitted. [*Stephen, C. J.* By the Act (h), the land is to be held for the objects and purposes of the Society. The plaintiffs are suing as trustees for the benefit of divers *cestui que trusts* ; must we not consider whether there has been a breach of trust ?] It is submitted that the *cestui que trusts* are not before the Court ; if they were, the defendants might plead that they had acquiesced. Although a man may be made a constructive trustee, where, with notice, he gets trust funds into his hands, yet he cannot be made such trustee of rights over his own land, which a trustee permits him to exercise.

At common law a man may make a noise on his own land ; but his neighbour, if he wishes, may prevent him. It is in not exercising the right of prevention that the breach of trust consists. A parol license is not revocable after the matter licensed is executed ; *Winter v. Brockwell* (i), *Siggins v. Inge* (k).

Stephen in reply. The plaintiffs do not claim derivatively in any sense. They come in as trustees, as the plea admits and the statute shows. Or they come in *virtute officii*, as absolute owners for the time being. How can they then have power to do anything extending beyond the term of their own interest ?

The JUDGES gave judgment orally ; and, the defendants having appealed to the Privy Council, the follow-

1866.

STENHOUSE
and another
v.
HARDIE
and another.

(a) 1 Cr. & Ph. 491.

(d) § 1553.

(f) 6 Price 280.

(i) 8 East 308.

(b) 2 Molloy 319.

(e) Ch. 27, s. 3 (p. 597, 4th ed.)

(g) 2 Russ. 105.

(c) 7 Ves. 235.

(h) 16 Vic., s. 4.

(k) 7 Bing. 692.

1866.

STENHOUSE
and another
v.HARDIE
and another.

ing is the statement in writing of the reasons for that judgment:—

The plaintiffs are the President, senior Vice-President, and Treasurer, for the time being, of the Institution or Society established in Sydney, called the Mechanics' School of Arts, in whom, as such office bearers, are (by the statute 16 Victoria, passed in December 1852) vested the land and buildings of the society, in trust for the purposes of the institution, and subject to its regulations and rules. And they complain that the defendants—who occupy the adjoining land, on which a steam-flour mill is erected—have rendered the buildings of the society useless for those purposes, and deprived the plaintiffs of the profit which they were accustomed to obtain, from hiring the rooms for lectures, and similar public entertainments therein, by making loud noises with the machinery of the mill, to the annoyance and disturbance of the plaintiffs and all persons permitted to resort to the said buildings. To this the defendants plead, by way of equitable defence, that their lessor—they being tenants of the premises for a term of years—erected the mill, and put up the machinery, with the consent of the then office bearers of the society; they, and also the plaintiffs, having notice that the working of that machinery would, necessarily, produce the noises complained of. The argument being, that, the society's representatives having with that knowledge permitted the lessor's outlay, and acquiesced in the erection, the present action would in equity be perpetually restrained. The plaintiffs accordingly have demurred to the plea, raising that question for our decision.

For the defendants were cited the cases in 7 Ves. 235, 8 East 308, 7 Bing. 682, 31 L. J. C. P. 64, and 2 Story's Eq. Jur. 1553; and it was insisted, that the trustees of the School of Arts, as owners in fee of the land and buildings used by the society, had necessarily power to give an effective assent to the erection complained of, binding on their successors in office and the members at large. On the other hand, it was contended that no assent by mere trustees, holding office temporarily only, and periodically succeeded by other indi-

viduals, could bind their successors—much less the members of the institution for the time being, including all from time to time subsequently joining the society. The assent itself, considering the objects for which the society was established, was a breach of trust entirely destructive of those objects; as the owner of the flour mill must himself—since the School of Arts was the subject of public legislation—be taken to have been aware.

On those two grounds, the latter more especially, we held that the plea was bad. The land and buildings of the Sydney Mechanics' School of Arts are, by the statute 16 Victoria, passed in 1852, vested in the President, senior Vice-President, and Treasurer, for the time being, in trust for the purposes of the institution, and subject to its rules and regulations. Now it must be admitted, that there is no statutory declaration what those purposes are; but we cannot be ignorant, and as Judges we may therefore take notice, that they are more or less those of mental improvement—and that the rooms of the society have been used, occasionally, for the giving of public lectures, is admitted on the record. It is impossible not to know, without formal allegations to that effect, that the din created by a steam-engine at work on the adjoining premises in the various processes of manufacturing flour, would materially interfere with, if not utterly defeat, any attempt, on the part of the next neighbours, to acquire knowledge by the means of lectures, or reading of any kind. We do not think, therefore, that the office bearers of this society—even with the assent of the then members, if given—could by any acquiescence or permission destroy, or thus seriously impair, the very objects for which those officers were appointed, in defiance of the statute under which they hold the land, and in fraud of the rights of their successors, as well as of all the present and future members of the society (*a*).

(*a*) In giving judgment their Honors expressed a desire to see a replication setting out the objects and purposes for which the office-bearers (the plaintiffs) were trustees; as it would then probably appear that the consent was utterly *ultra vires*, and void even as against the members—and therefore *a fortiori* as against future trustees and members.

1866.

STENHOUSE
and another
v.
HARDIE
and another.

1866.

CHEESBROUGH *against* ALEXANDER THOMSON, JAMES
MOLISON, and JOHN BLACK.

H. and T., being partners, were lienees of certain wool of the plaintiff. After the dissolution of the partnership, T. endorsed the lien to M. and B., to whom H. and T. were largely indebted for advances made to the firm. *Held* (Hargrave *dubitante*), that the endorsement was good, although made by one of the partners after the dissolution, being for the disposal of previously existing property of the firm, and for the paying off of part of their previously existing liabilities.

The endorsement on the lien was as follows:—

“Deliver the within wool to M. and B.”

Held valid and sufficient in point of form to pass the property in the wool to the assignees.

TROVER and detainee for thirty-eight bales of wool. The defendant *Thomson* allowed judgment to go in default. Pleas, by defendants *Molison* and *Black*—(1). Not guilty. (2). Non-detinet. (3). Not possessed. (4). Fourth plea, after identifying the goods sued for in the two counts, stated, that, before the accruing of the alleged causes of action, the plaintiff, by an agreement in writing, in the form required by the Act, 11 Vic., No. 4, in consideration of the sum of £1000 *bona fide* advanced to him by the defendant *Alexander Thomson* and one *James How*, then carrying on business together under the name and style of *How, Thomson, and Company*, gave to the said *Alexander Thomson* and *James How*, so carrying on business as aforesaid, a preferable lien to the extent of the said advance on the wool of the ensuing clip to be shorn from the plaintiff's flocks of sheep, consisting in number of 6500 or thereabouts, and then depasturing at Tareela, on the Liverpool Plains district, under the superintendence of the plaintiff; and by the said agreement it was further agreed that the said sheep should be shorn by the plaintiff at his expense, and that the wool thereof should be delivered by the plaintiff at Sydney, to the order of the said *Alexander Thomson* and *James How*, so carrying on business as aforesaid; and this agreement, within thirty days after the date thereof, was duly registered in the Office for the Registration of Deeds, at Sydney, in accordance with the provisions of the said Act; and afterwards and before the accruing of the said alleged causes of action, or any of them, the said *Alexander Thomson* and *James How*, so carrying on business as aforesaid, by endorsement on the said agreement, transferred the said lien to the said defendants, and thereupon, and in pursuance of the said endorsement, the

plaintiff delivered a portion of the said wool to the said defendants, and the said defendants accepted and received the same, and held and detained the same as security for the repayment of the said sum of £1000 so advanced as aforesaid. Averment, that at the commencement of this action the said sum so advanced was due and unpaid, and that the said wool so delivered as aforesaid is the goods in the said first and second counts severally mentioned; and that the said holding and detaining are the conversion and detaining in the said first and second counts severally mentioned. (5). Fifth plea, on equitable grounds, in the same words as the fourth plea, except that, instead of alleging that the lien had been transferred by endorsement, it stated that, in consideration of divers sums of money advanced to *How* and *Thomson* by the defendants *Molison* and *Black*, *How* and *Thomson* agreed to assign and transfer and did assign and transfer to the defendant the said preferable lien and all their interest therein, and, in pursuance thereof, ordered and directed the plaintiff to deliver the said wool to the defendant, and thereupon the plaintiff did deliver a portion, &c. Issue thereon.

At the trial before *Cheeke, J.*, in the November sittings, it appeared that the defendant *Thomson*, who had allowed judgment by default, had become insolvent before the transaction complained of, and that the real defendants were *Molison* and *Black*, who were connected with him in the matter. The plaintiff had a station in this colony, standing in his own name, called *Tareela*; and there was another station in Queensland, standing in the names of the plaintiff and one *Hodgson*, called *Rodney Downs*. *How* and *Thomson* had for many years been the mercantile agents for the owners of these two stations, and it had been usual for the owners of these stations to sign promissory notes, dated in blank, in favour of *How* and *Thomson*, for the purpose of being discounted by the latter, and thus providing funds for station purposes. These notes did not appear in the station accounts, and were, as it was understood, to be retired by the agents. Accordingly, in 1868, two

1866.

CHEESBROUGH
v.
THOMSON
and others.

1866.
CHEESBROUGH
v.
THOMSON
and others.

promissory notes, dated in blank, in favour of *How* and *Thomson*, had been signed by the plaintiff, and forwarded to *How* and *Thomson*, and discounted. By the accounts to the 31st December, 1863, rendered to the plaintiff by *How* and *Thompson*, the balance against the Tareela station was £1829 8s.; and on the 30th January, 1864, at the request of *How* and *Thomson*, the plaintiff executed in their favour a preferable lien on his wool, the consideration stated to be for an advance of £1000. In a letter dated 4th June, 1864, requesting the plaintiff to execute a mortgage of the Rodney Downs station, they say: "You will observe that the security is taken in the joint names of *Alexander Thomson* and *John Black*, the latter being a partner of the firm of *Molison, Black, and Smith*, of Brisbane, with whom, to facilitate the winding-up of our partnership, which expires on the 30th of this month, we have arranged to take over the greater portion of our Queensland accounts, and on whom we have advised Mr. *Hodgson* it will be necessary to draw in future, instead of on the Bank of New South Wales. Your own account (Tareela) will be kept by the writer after that date." On 30th June, 1864, the partnership between *How* and *Thompson* expired. It would seem that *Thomson*, or *Thomson and Black*, continued the agency for the Tareela station, but that the agency of the Rodney Downs station was transferred to the Queensland firm of *Molison, Black, and Smith*, in which *Thomson* was a partner. In the letter acknowledging the receipt of the mortgage executed by the plaintiff as requested in the letter of 4th June, the account against the Tareela station was enclosed, showing an indebtedness by the plaintiff of £1177 15s. In January or February, 1865, the plaintiff was called upon by one of the banks to pay, and in February, 1865, he did pay, the two promissory notes before referred to, and which had been discounted (but not retired, as the plaintiff imagined) by *How* and *Thomson*. They were for the respective amounts of £1093 14s. 7d. and £1263 8s., and were dated 26th August, 1863, and 2nd November, 1863. If the

amounts thus paid were credited to the plaintiff in the station accounts, the balance would seem to be in his favor for about £400. The wool in dispute in the present action, and which was covered by the lien of 30th January, 1864, had left the Tareela station in 1864; and on its arrival in Sydney, early in 1865, had been delivered to *Molison and Black*. On 18th February, 1865, the plaintiff, having paid the promissory notes above mentioned, demanded the wool from *Molison and Black*; but the latter refused to deliver it, on the ground that they had a lien on it; and the preferable lien of 30th January, 1864, when produced by them had an indorsement dated the 28th December, 1864, and signed by *How and Thomson*—"deliver the within wool to *Molison and Black*." *How and Thomson* became insolvent in March, 1865. It may be added that before the wool was sold, the plaintiff, having become aware of his liability on the promissory notes, had demanded the wool from *Thomson*; and that *Thomson* claimed the wool in the name of *Thomson and Black*, who, he stated, were creditors of the plaintiff, for amounts advanced since the termination of the old partnership between *How and Thomson*; and that when the plaintiff claimed to be entitled to credit for the amount of the promissory notes which he was liable to pay, and which ought to have been retired by *How and Thomson*, Mr. *Thomson* stated that the amount of the plaintiff's liability to the firm of *Thomson and Black* could not be affected by the state of the accounts between the plaintiff and *How and Thomson*, and the plaintiff then learned that the lien had been transferred to *Molison and Black* by *How and Thomson*, for advances made to the latter by the former.

The learned Judge ruled that, as regarded the transfer, it was a mixed question of law and fact, and asked the jury whether there was a transfer or not; and, if so, whether, at the time of the transfer, the balance was in favor of the plaintiff or *How and Thomson*. The jury found for the plaintiff for the amount claimed; and, in reply to a question put by his Honor, they replied that it was not a transfer, but a mere delivery order, and

1866.

CHEESBROUGH

v.

THOMSON
and others.

1866.

CHEESBROUGH

V.

THOMSON
and others.November 29,
1865.

that at the time of the transfer the balance was in the plaintiff's favor.

Martin, Q. C., obtained a rule *nisi* for new trial, on the grounds—1. That the jury ought to have been directed as to the effect of the endorsement by *How* and *Thomson*, and that the finding by the jury on that point was wrong. 2. That there was a misdirection by the Judge, and a wrong finding by the jury, as to the effect of the discounting of the plaintiff's two promissory notes, and the receipt of the proceeds by *How* and *Thomson*. 3. That there was not, in law or in fact, a repayment by the plaintiff to *How* and *Thomson* before the time of their transfer to Messrs. *Molison* and *Black*, and that the verdict ought, therefore, to have been for the defendants; and 4. That there was no evidence to justify any inference of fraud in the defendants, or in *How* and *Thomson*, and that his Honor's observations to the jury, as to the *bona fides* of the transfer, tended to mislead them on this point.

September 6,
1865.

Sir *W. Manning*, Q. C., and *Stephen* showed cause. It is submitted, as the plaintiff had given these notes for the purpose of his accounts, and as *How* and *Thomson* had discounted them and obtained the proceeds which exceeded their claim upon the plaintiff, that, as between these parties, the plaintiff was in credit. If the plaintiff cannot be said to be in credit until he has paid the notes, then the date of the transfer of the lien is material. But it is submitted that, under the circumstances, the jury were justified in finding that the endorsement was fraudulent. The endorsement did not pass the property in the wool. The debt secured by the lien was due to *How* and *Thomson*, and could not be transferred to *Molison* and *Black*. There is no assignment of the debt. The transfer by endorsement, without any transfer of the debt, passed no property in the wool; and if the debt is extinguished, the lien is gone. The transferee of a lien takes it subject to all its infirmities. Can *How* and *Thomson* transfer the lien free from the liability of becoming extinguished when the bills are paid? When

this lien was executed these promissory notes were outstanding—the plaintiff not knowing of the fact. But by their proceeds the debt of *How* and *Thomson* was discharged, subject only to its revival, should the plaintiff not pay these notes. The jury have found, as a fact, that, at the time of the endorsement of the lien, the balance was in the plaintiff's favor.

It also appears that the endorsement was by *Thomson* alone, although in the firm's name. It is submitted that if the endorsement is to operate as a transfer of the wool, it should be signed by both the partners. Can a transfer by *Thomson* alone, though in the name of *How* and *Thomson*, be a valid transfer of the lien or the wool? Even if it was a valid transfer, was not the lien at an end when the plaintiff took up the bills? The action was brought afterwards, and after the demand of the wool. The partnership of *How* and *Thomson* expired on 30th June, 1864, and at that time nothing was due to them; all was paid and overpaid by the promissory notes. The endorsement was a mere delivery order as to a wharfinger. Is the Court to hold, as a matter of law, that the property passed by such order? It is submitted that it is a question of fact with what intention the endorsement was made. But even for this purpose there could be no transfer by one partner after the dissolution of the partnership. It is clear it is not a mere endorsement, as in the case of *The Tigris* (a). It is a question of intention, what was meant to be passed, as in *Brown v. Hare* (b), where the plaintiffs had taken bills of lading, deliverable to their own order, and which they endorsed, "deliver to the order of *Hare* and *Co.*," the consignee; and it was held that the property in the goods contained in the bill of lading passed to the consignee on shipment, and that he was bound to pay for it, notwithstanding that the plaintiffs had taken the bills of lading deliverable to their own order; but that if the plaintiffs had shipped the goods on board, and had taken the bills of lading in that form, with the intention of retaining their control over the goods contrary to their

1866.
CHEESBROUGH
v.
THOMSON
and others.

(a) 32 L. J. A/m. 97; 9 Jur. N. S. 361. (b) 29 L. J. Ex. 6.

1866.
 CHEESBROUGH
 v.
 THOMSON
 and others.

contract, the property would not have passed. The jury had said that it was not meant to be more than a delivery order. It was a sham, if it was not a fraud, and this is a question of fact; *Rogers v. Hadley* (a). The object was only to keep the wool from *Thomson's* creditors. If, on the contrary *Molison* and *Black* gave value and was deceived, it is their own fault for not ascertaining that the debt was paid, or, at least, not due but suspended; *Price v. Price* (b), *Belshaw v. Bush* (c).

The *Attorney General* and *Darley* for the defendants. *Thomson* is not before the Court; but only *Molison* and *Black*. The latter were never partners with *Thomson*, and do not defend him. *Molison* and *Black* advanced (that is they previously, and after June, 1864, advanced) large sums to *Thomson*, and afterwards took from him this wool as security. But it is submitted that it is immaterial whether money was then due by the plaintiff or not. But at that time it is clear that the plaintiff did owe, or was liable to pay, money to *How* and *Thomson*. For these two bills which the plaintiff paid in February, 1865, were given by the plaintiff for purposes of finance in August and November, 1863. How could the lien given in August, 1864, be paid off by bills given in 1863? [*Stephen*, C. J. How is the court to ascertain whether or not there was a debt due to *How* and *Thomson* by the plaintiff, at the time these bills were paid in February, 1865?] Up to December, 1864, *Cheesbrough* continued indebted, and in the above £1000, to *How* and *Thomson*. The two outstanding promissory notes were not payments in any sense, nor so considered, and it was the duty of *How* and *Thomson* to retire them. They were mere instruments of finance, given to raise money; but if they were, they were overdue in December, 1864. Their payment eventually by the plaintiff would not prejudice *Molison* and *Black*, the defendants; for *Molison* and *Black* were then the *lienees*, by transfer from *How* and *Thomson*, for money advanced to the latter.

(a) 32 L. J. Ex. 24. (b) 16 M. & W. 202. (c) 11 C. B. 191.

As to the transfer by *Thomson*, even if the partnership had been previously dissolved, it was perfectly effectual. Notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun, but unfinished, at the time of the dissolution; *Butchart v. Dresser (a)*, cited in *Lindley (b)*. In that case two persons in partnership as sharebrokers contracted to buy shares; before paying for them they dissolved partnership, and that was known to their bankers. After the dissolution, one of the partners pledged the shares to their bankers for money to pay for their purchase, and authorized the bankers to sell the shares to indemnify themselves. The other partner contended that this was done without his authority, and that, as the bankers knew of the dissolution, they could not retain the shares as against him. And it was held that the partner who pledged the shares had authority, after the dissolution, to complete the contracts previously made by the firm; that he, therefore, necessarily had authority to raise the funds to pay for the shares in question, and that he had not gone beyond his authority in raising the money by pledging them with the bankers as he had done. This shows that *Thomson* could transfer or pledge the security.

The indorsement transferred the lien fully to *Molison* and *Black*. The lien passes by "endorsement" merely, and so the case resembles a bill of exchange, or of lading. The learned Judge ought to have directed the jury as to the effect of the endorsement as matter of law, and not have left it to them as a question of fact. The jury ought to have been directed that these words, "deliver to the order of *Molison* and *Black*," indorsed on the instrument amounted to a transfer within the s. 2 of the 14 Vic., No. 24 (c); and that under it *Molison* and *Black* had full disposing power over the wool. The

1866.
CHEESBROUGH
v.
THOMSON
and others.

(a) 4 De G. M. & G. 545.

(b) p. 332.

(c) This section enacts "that all liens on wool, or mortgages of live stock, shall be transferable by endorsement; and every endorsee thereof shall have the same right, title, and interest therein, respectively, as the original lienc or mortgagee."

1866.
 CHEMBROUGH
 v.
 THOMSON
 and others.

jury would then, in all probability, have returned a verdict for the defendants. There was no evidence whatever that it was not intended to be a transfer. A mere note or verbal authority would have been sufficient, if a mere delivery order was intended. In this case, as in that of *The Tigris* (a), the endorsement was special; and after endorsement there could be no payment by the plaintiff, except to the endorsee. It is like the case of bills of exchange, where payment can be made only to the person capable of giving a good discharge; *Chitty* (b). Even if the £1000 had, before the endorsement, been satisfied to *How* and *Thomson*, it was no answer unless the defendants knew that it had been paid. It was the plaintiff's duty to get possession of the lien and so prevent frauds by the lienee. The *bona fide* endorsee of a bill of lading acquires an indefeasible title to the goods contained in the bill of lading, as against the unpaid vendor of such goods; *Lickbarrow v. Mason* (c). It is submitted, however, that at the time of the transfer to the defendants, the plaintiff was indebted to *How* and *Thomson* in more than the £1000.

The plaintiff might have replied that the transfer of the lien was fraudulent. But on these pleadings there is no issue on the record to raise the question of fraud, and the defendants had nothing to do with the fraud. But there was no proof of any such fraud. *Pinnock v. Harrison* (d) was referred to.

STEPHEN, C. J. I am of opinion that the endorsement, in its existing form, was valid and sufficient (if the other points be established to support it) to pass the property to the assignee. The statute enacts that all liens of wool shall be transferable by endorsement, that is, by writing on the back of it. The statute was intended to encourage the advancing of money, from year to year, to embarrassed settlers. It being doubted whether there could be a mortgage of a growing crop, the Legislature said it should be valid—that the settler should not be

(a) 32 L. J. Adm. 97.
 (c) 1 Sm. L. C. 728.

(b) p. 269.
 (d) 3 M. & W. 532.

able to defeat the security, and that the merchant should be encouraged to make advances; and the Court is therefore bound, as much as possible, to carry out the object of the Legislature.

1866.
CHEESBROUGH
v.
THOMSON
and others.

The endorsement also, I think, was good, although made by one of the partners after the dissolution, being for the disposal of previously existing property of the firm, and for paying off part of their previously existing liabilities. Messrs. *How* and *Thomson* had a claim as lienees of the wool of the plaintiff, and they were also indebted to Messrs. *Molison* and *Black*. That being so, *Thomson* endorsed the lien, and, therefore, transferred the debt of £1000, with the property by which it was secured, to *Molison* and *Black*, for the purpose of paying off so much of the debt due to them. The evidence, apparently, preponderates, it seems to me, to show that the plaintiff's debt to *How* and *Thomson* was still unsatisfied at the time of the endorsement. It would also seem that there was, at the same date, a debt due by Messrs. *How* and *Thomson* to the defendants—forming a consideration for such indorsement.

HARGRAVE, J. As to the point of the one partner, *Thomson*, dealing with the partnership property, I need only refer to *Butchart v. Dresser* (a), where the partner pledged certain shares to raise money for the purpose of completing certain purchases; and it was held that the authority of the partner undoubtedly existed after the dissolution of the partnership, for the purposes of contracts entered into during its continuance. But, in the present case, the transfer to *Molison* and *Black* seems to me to be altogether subsequent; and I doubt whether Mr. *Thomson* was authorized to deal with the property in this way in December.

CHEEKE, J. I concur in the opinion that there must be a new trial.

Rule absolute.

(a) 4 De G., M., & G. 545.

1866.

HUMPHERY, official assignee, &c. *against* ROBERTS.

Where a bill of sale contained a power of sale upon default in the payment, on demand, of the amount payable thereunder, a demand of a larger sum than the amount justly payable does not vitiate the sale; and the mortgagor can protect himself by tendering the true sum, or, *semble*, by bringing an action against the mortgagees for demanding and selling for a larger amount.

DETINUE by the plaintiff, official assignee of one *Matthews*, an insolvent, for the title deed of certain land—that is, a grant from the Crown to insolvent, dated 6th December, 1865.

Pleas (1). Non detinet; (2). Not possessed; (3). On equitable grounds—that before the Crown Lands Alienation Act of 1861, *Matthews* was a person who had made improvements upon certain Crown lands in a proclaimed gold field, and was entitled to apply to the Governor, &c., for a sale and grant of the said lands in fee simple, without competition, at a price to be fixed by appraisement, within the meaning of section 8 of the Act; and that within twelve months after the passing of the Act, *Matthews* duly applied to be allowed to purchase the said land, upon which his improvements were, in accordance with section 8, and the application was referred to an appraiser to settle the price of the land, in order that the Governor, &c., might sell and grant the land to *Matthews* without competition, &c.; and that after the reference, and before the sale and grant, *Matthews*, by a certain indenture between him of the one part, and a firm of *Davies, Alexander and Company, &c.*, of the other part, for certain considerations, &c., bargained, sold, assigned, and transferred to the parties of the second part, their executors, &c., *inter alia*, a house and premises at Young, together with all right, &c., at law and in equity, of *Matthews*, of, &c., the said house and premises; and by the indenture, it was, *inter alia*, further agreed and declared between the parties that if default should be made in payment of all or any of the moneys, interest, commission, and premises mentioned in a proviso for redemption in the indenture contained for payment of the same respectively, or in case of the breach or non-performance of any of the covenants or agreements in the indenture contained, and on *Matthews'*

part to be observed, &c., then, and immediately thereupon, or at any time or times thereafter, it should be lawful for *Davies, Alexander and Co.*, or any of them, or any of their executors, &c., or their attorney, &c., or agent, to enter into and take possession of, *inter alia*, the said house and premises, and whether in or out of possession to make sale and absolutely dispose of the same, either by public auction or private contract, or partly one way and partly the other, for such price or prices, upon such terms and conditions and generally in such manner as the said parties of the second part, their executors, &c., attorney or agent, should think fit. Averment, that afterwards *Matthews* did make default in payment of the moneys, interest, and commission, and did not perform the covenants and agreements in the indenture contained on his part to be observed, kept, and performed; and after the said default the said parties of the second part bargained and sold to the defendant, amongst other things, for a certain price, the house and premises hereinbefore referred to, and in the indenture mentioned, together with all their right, title, and interest, in, to, and about the same. The plea then alleged that the house and premises so as aforesaid bargained, and sold, assigned, and transferred by *Matthews* to *Davies, Alexander and Co.*, and by them so as aforesaid bargained and sold to the defendant, are the same lands and the same improvements which *Matthews*, as hereinbefore mentioned, had applied for in accordance with the said 8th section of the said Act; and that after the bargain, sale, transfer, and assignment by *Matthews* to the said parties of the second part, *Matthews* obtained a grant from the Crown of the said house, &c., which is the grant in the declaration herein sued for; and that afterwards *Matthews* delivered the deed to the defendant as such purchaser as aforesaid from the said parties of the second part, to have and to hold the same as his (the defendant's) sole exclusive property as such purchaser as aforesaid, and as and for the title deed of the said house, &c., so as aforesaid bargained, sold, transferred, and assigned by *Matthews* to the said parties of the second

1866.

HUMPHERY
v.
ROBERTS.

1866.
HUMPHREY
V.
ROBERTS.

part, and by the said parties so as aforesaid sold to the defendant. Averment, that defendant obtained and had the deed by the authority of the said parties of the second part to him, as such purchaser as aforesaid, and that he detained and still detains the deed from the plaintiff by the authority of *Davies, Alexander and Co.* Issue thereon.

At the trial before *Cheeke, J.*, in the November sittings, it appeared that the plaintiff was the assignee of the insolvent estate of *Matthews*; and that *Matthews*, who was a storekeeper at Young, was entitled, as is set forth in the equitable plea, under the Crown Lands Alienation Act, to a grant of certain land at the gold diggings, at Young, which he had taken up and improved. His application for a grant had been allowed, and a certificate issued in his favour. *Matthews* obtained the grant on the morning of his sequestration and gave it to his wife, from whom the defendant received it. This deed the plaintiff now sought to recover. No conveyance appeared to have been executed by *Matthews* to the defendant.

The defendant rested his case on the equitable plea. Before the issue of the grant—namely, on 26th June, 1865—*Matthews* owed Messrs. *Davies, Alexander and Company*, of Goulburn, wholesale store keepers, with whom he had been in the habit of dealing, £460 8s. 3d.; and he then executed a bill of sale over all his stock and these premises, of which he expected to get a grant (as alleged in the plea), to secure that debt and future advances. After the execution of the bill of sale, *Matthews* paid off some of the debt, and reduced it to £188. For this balance he gave promissory notes, which were paid at maturity. The power of sale contained in the mortgage was to be exercised on failure to comply with a written demand for such balance as might appear to be due, on an account to be made up from the books of *Davies, Alexander and Co.* (a), and, “until

(a) The proviso for redemption was, “that if *Matthews*, his executors or administrators, do and shall, on demand, in writing to be made by, for, or on behalf of, the said firm of *Davies, Alexander and Co.*, and delivered personally to the said *Matthews, &c.*, or left at his

default, *Matthews* should hold the premises without interruption, &c." The transactions between these persons commenced in 1862. Their course of dealing was that *Davies, Alexander and Co.* supplied goods to *Matthews*, and took his bills at three or four months for the amount; *Matthews* never paid cash; but orders were given, and an invoice sent, with a bill for the amount for *Matthews'* acceptance. The sale under the mortgage, which was questioned in this action, took place on the 2nd April, 1866. At that time an acceptance given by *Matthews* for £208 had been dishonored. There were current bills for £102 and £191, not yet due, and £106 4s. for some goods sent the day before. On the 29th March, *Rodwell*, the agent of *Davies, Alexander and Co.*, made a written demand under the bill of sale, for payment of £791. *Matthews* said he could not pay that amount, "being taken on the hop without notice." *Rodwell* said his instructions were to take possession. *Matthews* said that only £208 7s. 6d., with a few days' interest, was due; that he should be able to take up the current bills. He also remarked that the demand included the £106 4s., the price of the goods only just delivered, for which therefore he was entitled to the usual credit. *Rodwell*, however, replied that his instructions were peremptory. *Matthews* did not pay or tender any of the amount thus demanded. *Rodwell* thereupon took possession, and advertised the stock and premises; and on the 2nd April proceeded to sell the whole by auction. The day before the sale defendant, who was a friend of

1866.

HUMPHREY
V.
ROBERTS.

usual or last known place of abode, &c., or at, or on, the said house, &c., at Young, &c., well and truly pay, or cause to be paid," &c., all money due, or to become due, "for advances, supplies, or on any other account whatsoever, according to an account to be made up from the books of the said firm." It afterwards provided that if default should be made in payment of all money, &c., "mentioned in the proviso for redemption," *Davies, Alexander and Co.* might enter into, and take possession, and sell either by public auction or private contract.

The deed also declared that no purchaser "of the premises, or any part thereof, shall be bound to enquire whether any such default as aforesaid has actually been made, or otherwise as to the propriety or necessity of any such sale or sales, nor be affected with express notice to the contrary," &c. There was also a proviso for quiet enjoyment, that "until default shall be made in payment" of any moneys, it shall be lawful for *Matthews, &c.*, to hold, use, and enjoy, the premises without any interruption by *Davies, Alexander and Co.*

1866.
HUMPHERY
v.
ROBERTS.

Matthews, offered to pay *Rodwell* £460, if he would withdraw; and the latter refused, unless he would pay the whole amount, £791, with costs. There was no evidence that the defendant, when he offered £460, knew what was due. It appeared that *Rodwell* went through the stock, and estimated its value at cost price, without charges of carriage, at about £1500. This estimate did not include the real estate. At the auction, on the following day, there was not a single bid. The defendant thereupon came forward and offered to buy the whole for the amount and expenses due to *Davies, Alexander and Co.* *Rodwell* accepted the offer, received his cheque, which was afterwards paid, for the amount, £800, and gave him up possession. The sale note stated that *Rodwell* had sold "the stock in trade, and all right, title, and interest, in, to, on, or about the premises occupied," &c., by *Matthews*. It seemed that *Matthews* had given some orders to other persons, which, as *Rodwell* said, had caused *Davies, Alexander and Co.* to close the account. *Scott*, a creditor of *Matthews* at the time of his sequestration for some flour for which *Matthews* had given a bill for £118, swore at the trial that after the auction he met the defendant, who said he would pay the amount if *Matthews* was agreeable, but that he was not agreeable. This evidence was relied on as showing that the purchase by the defendant was on *Matthews'* account. After the sale, as before said—in fact, on the morning of his sequestration—the grant in question was issued to *Matthews*, and received by the defendant. The plaintiff's case was, that *Davies, Alexander and Company* had no legal right to sell; but that if they had, the alleged purchase by the defendant was simulated and unreal, if not fraudulent. The defendant contended that even if the mortgagees gave no sufficient notice of default, or of their intention to sell, or were oppressive in other respects in their proceedings, the defendant was not responsible for it; as he bought honestly, and was entitled to keep what he bought.

His Honor left it to the jury to say whether the defendant purchased for valuable consideration, and bona

fide; and the jury thereupon returned a verdict for the plaintiff.

1866.

HUMPHERY

v.

ROBERTS.

December 3.

Stephen for the defendant, having obtained a rule *nisi* for a new trial, on the ground that the verdict was against evidence, and for misdirection,

Sir *W. Manning*, Q.C., and *Darley* now showed cause. December 19.
With regard to the equitable plea, it is submitted that at the time of the sale *Matthews* had the legal estate, and *Davies, Alexander and Co.* had a right to call on him to make their equitable interest good. The defendant, therefore, did not obtain a legal title, but only an equitable interest—an interest under which he might come into a Court of Equity and show that he was entitled to the legal estate. The plea is wholly an equitable plea, and unless *Roberts* could, in equity, compel the plaintiff, as assignee, to convey the legal estate to him, he cannot now succeed. But *Roberts* bought for *Matthews*, and is, therefore, trustee for him; but he can have no equity as against *Matthews*' creditors. The legal estate was in *Matthews*, and is now, therefore, in his official assignee. The plaintiff, therefore, says, "I represent *Matthews* and his creditors; you cannot call on me to convey the legal estate to you, a mere trustee for *Matthews*." The question is whether the purchase by *Roberts* was *bona fide* for himself, and it is submitted that the jury have by their verdict expressed their opinion that it was not; and the Court will not disturb that finding. In no case will the Court enforce the specific performance of a contract where a breach of trust is involved. "And the Court," says Mr. *Lewin*(a), "however correct the conduct of the purchaser, will refuse, at his instance, to compel the specific performance of the agreement."

It is submitted, however, that the sale was utterly unauthorized; only £208 was overdue, *i.e.*, on a dishonored acceptance. The residue of *Davies, Alexander and Co.*'s claim was on bills, or for goods, the credit for which

(a) Ch. 16, s. 1.

1866.

HUMPHERY
V.
ROBERTS.

had not expired; the first current acceptance was payable in April. The value of the goods seized was about £1400. There was no legal sale, for there was no legal demand. The demand for £791, and with instruction that nothing less would be taken, was not a proper demand, and non-compliance with such demand was not a default. *Matthews* was entitled to hold until default, upon a proper demand having been made. Where, by the express terms of the instrument, time was given up to the time of notice in writing, a reasonable time at least was held to be meant by the word "immediately," and by a reasonable time to be meant time enough to seek the creditor, or a person authorized by him to receive the money—time for inquiry; *Tom v. Wilson* (a). And half an hour's notice has been considered not reasonable; *Bright v. Norton* (b). According to the bill of sale, the accounts are to be made up from the books of *Davies, Alexander and Co.*; but there was no evidence to show that these accounts were so made up. Nor did *Matthews* know or have an opportunity of learning whether the demand was by an authorised agent; and no time was allowed for procuring the money. [*Stephen, C. J.* But can *Matthews* himself take these points now? If not, can his official assignee? *Matthews* never having objected to the sale on such grounds. Is a purchaser under a mortgage, with power of sale, bound to see to all these things?] If there was no legal demand, how could there be a default? and if there was no default, how could there be a legal or effective sale? The money originally secured by the mortgage was paid off; it extended, however, to future supplies; but nothing was due (or there was no forfeiture) till the time of credit had expired. *Bramwell v. Eglinton* (c) will be relied on by the defendant. It was there held that the fact of there being a bill of exchange taken on account of the debt, which was secured by the bill of sale, did not disentitle the defendant from taking possession, under the bill of sale, pending the currency of the bill. But it is there suggested that although the defendant might take

(a) 32 L. J. Q. B. 33. (b) 32 L. J. Q. B. 38. (c) 33 L. J. Q. B. 130.

possession, he would be restrained from selling. There the bill of sale was to secure a specific sum then due, but here the amount was not due until the expiration of the credit. Now here this was true only as to £208; the course of dealing showed that there was credit given. To work a *forfeiture*, however, the demand must be of the exact sum due, a penny more or less will defeat the demand.

The mortgagees redemised to *Matthews*, so that by the issue of the grant after the mortgage, *Matthews* became legally and equitably entitled until default. There is, in the mortgage, a redemise till then. So that the defendant obtained no title or right whatever. "By the deed," says *Willes, J.*, in *Spackman v. Miller (a)*, "the person who is substantially the mortgagee of the chattels redemises them to the bankrupt, whereby he puts himself, of his own accord, into a position in which he has no immediate right to the possession of the goods." And *Bradley v. Copley (b)* is to this effect. In that case *A.* being indebted to *B.*, by a bill of sale which was found to have been *bona fide* executed, conveyed to him all his stock in trade, household furniture, &c., absolutely. The bill of sale contained a covenant by *A.* to pay the debt on demand, and a proviso for redemption on payment of the debt and interest on demand, and a further proviso that the assignor should continue in possession until default. The goods having been subsequently, and before any demand by *B.*, seized under a *fi. fa.*, by the sheriff, the Court held that *B.* had not such a right of immediate possession as to entitle him to maintain trover against the sheriff. So when this grant issued, *Matthews* was seized in *fee* until default. There was never an acquiescence in the sale by *Matthews*; certainly not in the seizure; and, moreover, his acquiescence in the mere sale, if there be one, was of no moment. If his estate was not defeated by an effectual demand, it remains in him (that is in his assignee) still. The assignee is entitled to defeat the sale, although the insolvent could not; *Lewin on Trusts (c)*. The Judge should have directed the jury on the question

1866.
HUMPHREY
v.
ROBERTS.

(a) 31 L. J. C. P. 313. (b) 1 C. B. 685. (c) Ch. 16, s. 1.

1866.
HUMPHREY
V.
ROBERTS.

of the validity of the demand, and, consequently, whether there was any default. It was proved that *Roberts* knew of the circumstances about the demand, therefore he purchased with notice.

Per Curiam. We will relieve the defendant from arguing the question of fraud, as we think there was no evidence of fraud. It is clear that it was a *bona fide* sale to the defendant, who, it may be, intended to befriend *Matthews*. The defendant being the owner in fact, intended to hand over any surplus on the transaction to *Matthews*. But there was no reason to suppose that the sale did not take place.

Stephen, in reply. There never was an express contract to give credit; there was a course of dealing but no binding agreement on *Darics, Alexander and Co.*; at all events, no such contract has been found as a fact by the jury. If, however, credit was given, the covenant was to pay on demand, and the subsequent arrangement to give credit will not defeat it. Bills of exchange having been given afterwards cannot get rid of the terms of the bond; *Bramwell v. Eglinton (a)*. The strictness required in a demand of rent cannot apply to a case like this between debtor and creditor. Will the demand of a penny too much, by miscalculation of interest, or the like, vitiate the demand? But the covenant is the guide, and this has been complied with. If the demand here was of more than was due, *Matthews* should have tendered the proper sum. The mortgage contains a clause that no purchaser shall be bound to inquire concerning the default, or anything else affecting the right of sale. But the plaintiff should have replied specially the facts now relied on in order to avoid this sale. The only matters in issue were those alleged in the plea. No Court of Equity would defeat the sale because of a mere error in an unsubstantial matter; *Metters v. Brown (b)*. "The Court," says Vice-Chancellor *Stewart*, "is always slow to interfere against a *bona fide* purchaser, and I am not aware of any case in

(a) 33 L. J. Q. B. 130.

(b) 33 L. J. Ch. 97.

which the Court has done this where there has been an absence of fraud." But here fraud is negatived. Notice by the defendant of any irregularity, if relied on, ought to have been replied. There was no hardship in the sale, for it appears that ten days before, *Davies, Alexander and Co.* telegraphed that they intended to close the accounts. The bailiff was also in possession for five days ; so that there was amply sufficient time for making payment, or for inquiring into *Rodwell's* authority. There was some evidence that the sum was in fact made up from the books.

1886.
HUMPHREY
v.
ROBERTS.

STEPHEN, C. J. In my opinion there has been a miscarriage of justice in this case. There was a mortgage to *Davies, Alexander and Co.* by *Matthews* ; some money was overdue ; some was due, but not payable. The mortgage was for all money due. *Davies, Alexander and Co.* thought fit to act harshly, imagining, perhaps, that *Matthews* was on the eve of insolvency. They sent up an agent to demand the whole sum due. I am clearly of opinion that the demand of a larger sum than the amount justly payable did not vitiate the sale, as, confessedly, there was some money payable ; and the mortgagor might have protected himself by tendering the true sum, or possibly by bringing an action against the mortgagees, for demanding and selling for a larger amount. Any other doctrine would imperil large interests. Money is lent on a station ; and a mortgage taken for the amount and interest and commission. In such a case the mortgagee sends in a claim, charging a shilling more than is strictly payable, and upon its non-payment proceeds to sell. It is contended that the demand of a larger sum than is due, vitiates the entire demand, although the larger portion of the sum demanded is due. Such, in my opinion, cannot be the law.

In this case the question should have been put to the jury, whether these goods were by the contract to be supplied on credit.

It appears that, at the time of the seizure, *Matthews* objected that he was taken "all on the hop," and that he had no time to make any arrangements ; and, if he

1866.
HUMPHREY
v.
ROBERTS.

had continued to insist on the objection, the case might have been different. But the agent went into possession four days before the sale; and *Matthews* applied to *Roberts*, the defendant, to assist him. I think it likely that *Roberts* was willing to befriend *Matthews*, if he could do so without injuring himself. At the auction, there being no bidders, and it being probable that, if *Roberts* would purchase the assets, it would be a safe transaction, *Roberts* paid the amount. He remained in possession, sold some of the stock, and thus repaid himself the amount, except about £150. Assuming that there was a promise by *Roberts* to allow *Matthews* any benefit to be derived from the transaction, there was no consideration for this promise on the part of *Roberts*, neither was the promise in writing; and I do not see how the assignee of *Matthews* would be able to enforce it. I doubt if either *Matthews* or his assignee could recover this property from *Roberts*, on paying to him the amount he had advanced. If there was no concert between *Matthews* and the defendant, there was no fraud; and the latter has a clear right to keep the property. If there was any fraud, *Matthews* must have acquiesced in the sale, and his assignees cannot now step in and upset it. The purchaser is not bound to inquire into any irregularities in the sale. If, therefore, *Matthews* acquiesced in, and, above all, brought about, the sale, his official assignee cannot now question its legality. The questions for the jury in this case are—1. Whether there was a contract between *Matthews* and *Davies, Alexander and Co.*, that the former should have three or four months' credit; 2. Whether *Matthews* did, at or before the sale, acquiesce in the sale, and thus waive any previous objection; 3. Whether *Roberts* did or not purchase for the protection of *Matthews*, and to give him the benefit of any balance; and 4. Whether the purchase by *Roberts* was or not his own.

CHEEKE, J. I was astonished at the finding of the jury on the third issue, and think it manifestly wrong.

FAUCETT, J. There was, in my opinion, no evidence of fraud on the part of *Roberts*. The question of default

depended on the terms of the dealing between *Matthews* and *Davies, Alexander and Co.* If the course of dealing was, that goods should be supplied on a credit for three or four months, the money demanded was not payable under the bill of sale. That question was not left to the jury. It seems to me that a demand of the greater amount includes a demand of the less; and that *Matthews* ought to have tendered the amount he admitted to be due. By the terms of the bill of sale, the sale was to be valid as against the mortgagor or mortgagee. The mortgagee is said to be trustee for the mortgagor; and perhaps, as between these parties, the mortgagee may be liable to the mortgagor. But how can the purchaser from the mortgagee be liable, especially when he purchased being protected by the terms of the deed? *Matthews*, it is clear, acquiesced in the sale; in fact, he invited the assistance of the defendant. There is no evidence that at this time *Matthews* contemplated insolvency. The purchase having been made by the defendant for the benefit of *Matthews*, and at his instance, how can the latter or his assignee question the sale as against the defendant, whatever may be his rights as against the mortgagees for the course they adopted?

1866.

HUMPHREY
v.
ROBERTS.

Rule absolute.

Ex parte DESMOND (a).

December 14.

WINDEYER moved to make absolute a rule *nisi* for a prohibition, to restrain further proceedings upon a conviction under the Inclosed Lands Act (b). The trespass was openly and avowedly done in the *bona fide* assertion and exercise of a right-of-way; and the justices were distinctly so apprised at the hearing, but they nevertheless proceeded to adjudicate, and fined the appellant. The evidence shows that a former proprietor was asked to shut up this road, and that he said that it was more than he dare do. It appears, also, from the

The *bona fide* assertion of a claim of right, whether well or ill founded, if only it be honestly made, ousts the justices of all jurisdiction to convict upon an information under the 18 Vic. No. 27, for entering into enclosed lands without lawful excuse.

(a) Before *Stephen, C.J., Cheeke, J., and Fancett, J.*
(b) 18 Vic. No. 27.

1866.

Ex parte
DESMOND.

testimony of several witnesses, that the road in question had been used for several years by the mail driving along it, and by funerals traversing it; and this right-of-way had been in controversy on former occasions. The gate or slip-panels which have been across the road for the last twenty years do not negative the existence of a right of road shown to have been during the same period exercised by the public. At all events, the justices had due notice that the claim made by the applicant was *bona fide*.

Darley for the respondent. The section under which this conviction was made enacts that any person "without lawful excuse" entering into enclosed lands "without the consent of the owner or occupier thereof, or the person in charge of the same," shall be liable to a penalty. It is, therefore, a question of fact for the justices whether there was such lawful excuse. Here there was no consent; and the defendant was bound, therefore, to satisfy the justices that he had the excuse. This is no question of jurisdiction, but of evidence; and this Court, therefore, cannot interfere. The complainant, it appears, gave notice to the public that there was not the right claimed, and the justices were bound to take notice of this fact. The burden of showing that there was this lawful excuse lay on the applicant; and it must be assumed that the justices were satisfied there was no "lawful excuse" within the meaning of the Act. The Court will not grant a prohibition unless the justices are demonstrably wrong on the evidence, it not being a question of law. *R. v. Dodson* (a) shows that it is for the justices to decide whether the assertion of title is a pretence or not. In that case a certain right to cut estovers in Bagley Wood had been claimed by some inhabitants of South Hinksey. This wood belonged to the president and scholars of St. John's, Oxford; and on a trial bringing it into question, the president and scholars obtained a verdict. This verdict was acquiesced in for a time; but after a few years new

(a) 9 A. & E. 704.

trespasses began. Injunctions were obtained against some parties, and they desisted ; but others continuing trespassing, injunctions were obtained against them also, and at this time one *Keen* committed the trespasses complained of before the justices. The justices believed that *Keen* committed these trespasses when he did not believe that he had any right, and for the purpose of exciting others to do the same ; and the Court held that the justices were entitled to form their own judgment on these circumstances. *Ex parte Dutton* (a) shows that a claim of right must be fair and reasonable as well as *bona fide*.

1866.

Ex parte
DESMOND.

STEPHEN, C. J. The offence created by the statute is in the nature of a criminal offence ; and no man can be guilty of such an offence unless to some extent his mind goes with the act. It is clear, from the proceedings, that the justices did not decide against the *bona fides* of the claim, but against the validity of any claim of right, however honest it may have been, unless the right claimed was shown by evidence to have been well founded. Therefore they were clearly wrong in point of law ; for the entry on land, in the *bona fide* exercise of a claim of right, well or ill founded, if only it be honestly made, is clearly excusable. Nay, and without reference to the provision in the enactment as to lawful excuse, the *bona fide* assertion of such a claim ousts the jurisdiction of the justices. And there was, in fact, no pretence for disputing the *bona fides* of the claim, had it been disputed.

It may be conceded that if the claim is made vexatiously in defiance not only of warnings, but of every reasonable presumption against it (as, for instance, after a distinct legal decision against the claim, perhaps, more than once), it may not avail the trespasser ; for it might be inferred in such a case that the claim was *mala fide*,—in other words, not honest. The writ of prohibition will therefore go with costs against the justices, as well as the prosecutor. But no execution to issue against

(a) *Wilkinson's Australian Magistrate*, 2nd ed., 345.

1866.
Ex parte
DESMOND.

the former unless the writ against the latter be returned *nulla bona*.

CHEEKE, J. I am of the same opinion.

FAUCETT, J. The justices decided wrongly on the evidence that a fair and reasonable claim was not a lawful excuse; and the prohibition, therefore, must go.

Rule absolute.

December 5.

PRING *against* MARINA.

The erection of a dam by a riparian owner across a running stream cannot be lawful if it obstruct for one moment the flow of the entire stream to the other lands below.

Action for erecting a dam upon a stream, and thereby obstructing the flow of the water, to the injury of the plaintiff, who occupies land lower down the stream.

Plea: that the said stream flowed through the defendant's run, and the defendant was entitled to the reasonable use of the water thereof for himself, servants, &c., and for the beneficial use of his run; and that for such reasonable use, &c., he erected the dam, and thereby interrupted and obstructed the flow of the water of the stream a little and not more than was necessary for the purposes aforesaid, and that the interruption and obstruction were not nor are they a continuous interruption and obstruction of the water, but were for a short time only, and until the water rose to the level of the said dam, leaving during such time sufficient water in the stream for the plaintiff's use; and that thereupon the stream flowed and continued to flow into and upon the plaintiff's land. Averment, that the quantities of water so interrupted and obstructed were and are very small and inappreciable quantities, and not more or greater than were and are necessary for the defendant's purposes, and the small and inappreciable quantities were and are not required, and had at no time theretofore been appropriated, by the plaintiff, and the said interruptions and obstructions did not deprive the plaintiff of the use of the stream, nor have they occasioned any actual or perceptible damage to the plaintiff. *Held*, on demurrer, bad.

SECOND count of the declaration; For that the plaintiff was possessed of a certain other run or station, called the Crowther Creek run, and was entitled to have the use of a creek or stream of water called the Back Creek, which flowed through the same from the adjoining run of the defendant, called the Bendeck Murrell run, for the plaintiff, his family, and servants, his sheep, and cattle, and horses to drink, and for other purposes, and the defendant has wrongfully made and erected a dam upon the said creek or stream, and has thereby interrupted and obstructed the flow of the water of the said creek or stream into and upon the said run of the plaintiff, whereby the plaintiff has been and still is deprived of the use of the water of the said creek or stream for himself, his family, and servants, his sheep, and cattle, and horses to drink, and for other purposes,

and has been and still is hindered from enjoying the use of the said creek or stream in so ample and beneficial a manner as he otherwise would have done, and his said run or station has been diminished in value.

Plea, that before and at the time of the said several supposed causes of action the said creek and stream of water flowed through the defendant's said Bendeck Murrell run in its usual stream and current, and by reason thereof he was entitled to the reasonable use of the water of the said stream for himself, his servants, and his sheep, cattle, and horses, and for the beneficial use and enjoyment of his said run; and that for such reasonable use and for the purposes aforesaid, he made and erected the dam in the second count mentioned, and thereby interrupted and obstructed the flow of the water of the said stream a little and not more than was necessary and convenient for the purposes aforesaid, and that the said interruption and obstruction were not nor are they a continuous interruption and obstruction of the said water, but were for a short time only, and until the water rose to the level of the said dam, leaving during such time sufficient water in the said creek for the use of the plaintiff; and that thereupon the said stream flowed and continued to flow into and upon the said run of the plaintiff, and into and upon the said Back Creek in the plaintiff's said run. Averment, that the quantities of water so interrupted and obstructed were and are very small and inappreciable quantities, and not more or greater than were and are necessary for the defendant's purposes aforesaid, and the said small and inappreciable quantities were and are not required, and had at no time theretofore been appropriated, by the plaintiff for his said purposes, as in the second count alleged; and the said interruption and obstruction did not nor do they deprive the plaintiff of the use of the said stream for his said purposes, as in the said second count alleged, nor have they occasioned any actual or perceptible damage to the plaintiff.

Demurrer and rejoinder.

1866.

PRING
V.
MARINA.

1866.

PRING
V.
MARINA.

Blake in support of the demurrer. The erection of a dam by the defendant is not such a use of the water as he is in law entitled to as a riparian proprietor. For a riparian proprietor has no right to stop the entire flow of the stream. Such a use cannot be reasonable within the ruling in *Lord Norbury v. Kitchen* (a). The gravamen of the offence is the stopping of the flow of the stream by the erection of a dam. The interruption and obstruction of the stream until the water rises to the level of the dam, which the plea admits, is utterly unjustifiable. No such right is claimed by the plea in *Embrey v. Owen* (b); and the language of the judgment in that case is adverse to the existence of any such right. "The right," says *Parke, B.*, "to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream that flows through it." But the right claimed in this plea is an unreasonable and unauthorised use of this common benefit, and therefore untenable. *Beckett v. Morris* (c) is a distinct decision as to the rights of riparian owners, by the highest Court of the realm, and shows that such owners are not entitled to use their privileges in such a manner as to interfere with the natural flow of the stream. "It is quite clear," says the Lord Chancellor, "that neither proprietor can have the right to abridge the width of the stream or to interfere with its regular course; but anything done *in alveo*, which produces no sensible effect upon the stream, is allowable." He continues, "If

(a) 10 Jur. N. S. 132. (b) 6 Exch. 369. (c) 1 L. R. H. L. 59.

the erection of a boathouse obstructed the river or diverted its course, essential as it might be to the proprietor's full enjoyment of the use of the river, it could not be permitted." And Lord *Westbury*, in his judgment, says, "This is a case of very considerable importance, because, as far as I know, it will be the first decision establishing the important principle that an encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving either that damage has been sustained, or that it is likely to be sustained, from that cause. "When," he adds, "it is said that the proprietors of the bank of a running stream are entitled to the bed of that stream as their property *usque ad medium filum*, it does not, by any means, follow that that property is capable of being used in the ordinary way in which so much land uncovered by water might be used, but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream. Now, the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage, at a future period, to another proprietor. It is wise, therefore, to lay down the general rule, that, even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet, if any obstruction be made to the current of the stream, that obstruction is one which constitutes an injury which the Courts will take notice of as an encroachment which adjacent proprietors have a right to have removed." So also, in *Sampson v. Hoddinett (a)*, after stating that every proprietor of lands on the bank of a natural stream has a right to use the water, provided he uses it so as not to work any material injury to the rights of other proprietors above or below in the stream, the judgment continues: "In the present case, it appears to us, on the evidence, that

1866.

PRING
v.
MARINA.

(a) 26 L. J. C. P. 150.

1866.

PRING
V.
MARINA.

the detention by the defendant, under the circumstances, of the water of the River Yeo for the purposes of irrigation, was a use of it which in its character was necessarily injurious to the natural rights of the plaintiff, as the proprietor of land lower down the stream. The effect was obviously the same as if the defendant had placed a bar or weir across the river, and by that means had wholly prevented its natural course for a certain number of hours." The latter passage is the precise defence now attempted to be set up.

Butler in support of the plea. A diversion of a stream may be more injurious than a temporary stoppage. It is submitted that it is entirely a question of damage, and no action will lie unless such special damage can be shown. It is like the case of a nuisance in a public highway, in which case, if a man be disturbed in going that way, he shall not have an action. The plea is framed after the precedent in *Embrey v. Owen* (a). [*Stephen*, C. J. The plea admits that there has been an obstruction for a short time. There is a private right in water, for a man can use the *corpus*; but a right-of-way is a mere easement.] It is submitted that the question is, whether there is an injury to a right; and that must depend on the circumstances of each case. "It is," said *Parke*, B., delivering the judgment of the Court of Exchequer in *Embrey v. Owen* (a), "entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application." He adds, "The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so long as the reasonable use, by one man, of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie." And *Williams v. Morland* (b) is precisely in point. The declaration

(a) 6 Exch. 356.

(b) 2 B. & C. 917.

complained of an erection of a dam by the defendant across a running stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner; and thereby the water ran in a different channel, and injured the banks and premises of the plaintiff; and the jury having found that the banks and premises were not so injured, the Court sustained a verdict for the defendant on the general issue. *Littledale, J.*, in his judgment, says: "Water is of that peculiar nature, that it is not sufficient to allege, in a declaration, that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of water. The mere right to use the water does not give a party such a property in the new water constantly coming as to make the diversion or obstruction of the water *per se*, give him any right of action. All the King's subjects have a right to the use of flowing water, provided that, in using it, they do no injury to the rights already vested in another by the appropriation of the water." [*Stephen, C. J.* If the plaintiff had in that case alleged that a less than the proper quantity of water had come down, would he not have shown a cause of action? As it was, he rested his case on the injury done to his banks, and he failed because the jury found that there was no such injury.] In *Sampson v. Hoddinott (a)*, which has been relied on, the question at issue was merely whether there had been special damage caused by the mode in which the defendant, a riparian proprietor, had used the water; and the Court held that the user by the defendant had been beyond his natural right. [*Hargrave, J.* The plea alleges that the plaintiff has not been injured; but ought it not to go further, and say that he cannot be injured thereby?]

STEPHEN, C. J. I am of opinion that the plea is bad. The erection of a dam by a riparian owner across a running stream, might, perhaps, under some circum-

1866.

 PRING
 V.
 MARINA.

(a) 1 C. B. N. S. 611.

1866.

PRING
v.
MARINA.

stances be lawful. But it cannot be so, I conceive, if it obstruct—though for one moment only—the flow of the entire stream to the other lands below. The erection of a dam might be justified, probably, if by such erection only a reasonable portion of the water was retained for the occupier's necessary purposes. But it is not enough for him to show, that in some way or other, sufficient water is allowed to pass for the use of the lower riparian proprietors. For the stream, in its undiminished natural volume (or undiminished except by quantities necessarily abstracted for the use of owners higher up) belongs to each riparian occupier throughout its course. The question whether a particular use of the water, therefore, by any such occupier, is or is not justifiable, depends on the inquiry whether the user was reasonable, relatively to the rights of other riparian owners. Now it may be a reasonable user, possibly, to cause a considerable portion of the stream to be diverted, temporarily, into a dam. But here the whole stream has been so diverted, or, if arrested merely in its progress, the whole has been arrested; so that, even if the ultimate diminution of volume was very small, the lower occupiers had in the mean time (i.e., during the filling of the reservoir created by the dam,) no water from the natural stream at all. The sufficiency of water, alleged by the defendant to have been left for the plaintiff's use, may have been water lying in holes or ponds only. But the plaintiff, having a right to constantly flowing water from the stream entering or passing by his land, need only establish in an action of this kind an interruption of that right. Actual pecuniary damage by the injury is not necessary. There may indeed be a loss sustained by the temporary deprivation of such a right, inappreciable by money.

HARGRAVE, J. I am of opinion that the plea is bad. The defendant has tried to increase the value of his own run at the expense of the lower riparian owners. There is no authority to justify his so dealing with the banks or volume of a flowing stream. Such a right can only

be acquired by prescription or as an easement. Any right to stop for a single day the flow of any stream would be inconsistent with the common law rights of other riparian owners.

1866.
PRING
v.
MARINA

CHEEKE, J. If the plea had alleged that there was no actual stoppage of the running water. I think it would have been good; but it contains no such averment.

Judgment for the plaintiff.

Ex parte SALMON.

December 4.

STEPHEN moved for a prohibition to restrain further proceedings upon a conviction by certain justices whereby the applicant was convicted that he, "being a person holding a publican's license under the Sale of Liquors Licensing Act, did, on the 30th June, 1866, suffer and permit to be sold, at *Regan* and *Dempsey's* store, it being unlicensed and apart from the licensed house of the said *T. Salmon*, two gallons of old tom," &c. The information charged the offence in the same terms. It is submitted that neither the information nor conviction discloses any offence; and therefore, even if the evidence showed an offence, the Court cannot say that the justices would have convicted the applicant of the offence of which the Court may suppose him to be guilty. The second section of the Act (a) provides that "every term used in this Act importing the commission of any offence shall include and apply to the wilfully permitting or suffering the commission of a like offence by any other person, and shall render the person so wilfully permitting or

By section 8 of the Sale of Liquors Licensing Act, 25 Vic., No. 14, every person who shall sell in any house any liquor without a license, shall be liable to a penalty. By section 2, every term used in this Act importing the commission of any offence shall include and apply to the wilfully permitting or suffering the commission of a like offence by any other person, and shall render the person so wilfully permitting

or suffering liable to the like penalty as by any of the provisions hereof attend the actual commission of the like offence. A. was informed against for and convicted of permitting to be sold liquors in an unlicensed house, without alleging that he wilfully so permitted, &c. *Held (Hargrave, J., dissentiente)* that the conviction was bad; but the Court, on motion for a statutory prohibition, amended the conviction.

(a) 25 Vic., No. 14.

1866.

Ex parte
SALMON.

suffering liable to the like penalties and consequences under this Act as would by any of the provisions hereof attend the actual commission of the like offence." If a man commits an offence, he is liable; and if he wilfully permits or suffers the commission of such offence, he is also liable. The information and the conviction, therefore, may charge either one or the other. If no proof of the offence, the conviction might be supported by evidence of a wilful permission. But here there is no allegation of wilfulness in either the information or conviction. It is clear that a person might do the act complained of inadvertently or in ignorance or misconception of the law. Even although the evidence show that the act was wilful, the Court cannot now exercise the discretion of the justice and convict the applicant of an offence with which he is not charged. In *Carpenter v. Mason (a)*, the Court held that an information against a parish officer for misapplying moneys of the parish, must state that he misapplied them wilfully—the statute creating the offence using that word. "The word 'wilfully,'" said Lord Denman, "is connected with misapply. The word misapply does not, of itself, imply wilfulness." The remarks of Lord Denman equally apply to the words "suffer or permit."

Darley contra. The argument that a person might permit or suffer without wilfulness has no application to the circumstances as they appear on these depositions. It appears that there was a clear authority to the servant of *Ryan* and *Dempsey* to sell, on the premises of *Ryan* and *Dempsey*, liquors which came from *Salmon's* stores. This specific authority involves wilfulness in the person giving the authority; and the allegation, therefore, is unnecessary. He referred to *R. v. Justices of Radnorshire (b)*.

Stephen in reply. The Court will not amend. The conviction was returned after the attention of the justices was directed to the omission, and they have not

(a) 12 A. & E. 629.

(b) 9 Dowl. 98.

amended. How can the Court presume, therefore, that the justices believed that the act was wilful ?

1866.

Ex parte
SALMON,

STEPHEN, C. J. The appellant was convicted (not of selling liquor, but) of permitting it to be sold, without alleging that he wilfully permitted it to be sold. I am of opinion, therefore, that the conviction is bad because of this omission. The legislature has inserted this word in the statute, and I cannot say that it is immaterial. But, for myself, I doubt whether the conviction can in any case of this kind be framed otherwise than under sect. 2, *i.e.*, for selling liquor, although such selling may be alleged to be the then and there wilfully permitting a person (named) to do so. For by the statute the only offence is selling, and the wilful permitting it is only made conclusive proof of such offence. But we all think that the conviction may and ought to be amended by inserting the omitted word, although the information also omitted it. For, in our opinion, the appellant had notice of the legal charge intended to be established against him ; and, in substance, “ permitting ” may be understood to mean a wilful act, although, in point of law, it may be necessary to state such wilfulness. The adjudication may be fairly understood to be like the information, that the appellant did, in fact, wilfully—and not by oversight—permit the sale. So that I think the conviction, when amended, will not extend beyond, but will be in accordance with, the charge. But, in my opinion, the amendment ought only to be on payment of costs by the informer, who is interested in the penalty.

HARGRAVE, J. I admit the general rule, that the conviction should state the offence in the particular words used in the statute creating the offence. But here I think the word “ permit ” implies wilfulness. The conviction, therefore, seems to me quite right. But if an amendment were necessary, I have no doubt as to the power of the Court to amend ; and if the conviction be amended, both parties ought to pay their own costs.

1865.

Ex parte
DESMOND.

CHEEKE, J. I think that the conviction is wrong. It ought to have been alleged an illegal sale, and then the provision of the second clause might have applied.

Judgment accordingly.

July 10.

LEVY against SMITH (a).

Notice to admit not having been given, costs of proving documents not allowed in the absence of the Judge's certificate under the 92nd section of the Common Law Procedure Act.

HARGRAVE, J., gave judgment in this case as follows :— This was an application made before me, to review the taxation of the defendant's bill of costs ; the defendant contending that the Prothonotary ought to have allowed, as between party and party, certain items which I will separately consider.

1. As to the costs of twelve subpoenas and sixteen copies and services of the same on Messrs. *Frazer* and eleven other persons, or their partners, holding certain promissory notes made by one *Spencer Ashlin*, which promissory notes and witnesses the defendant's solicitor thought it might be expedient to produce at the trial, in order to "prove indebtedness, if denied," or "to check other testimony." I am of opinion that the Prothonotary properly disallowed these costs as between party and party, on the ground that the defendant's attorney should have given the usual notice to inspect such promissory notes, and to admit copies thereof under the general rule contained in sec. 92 of the Common Law Procedure Act. See *Rutter v. Chapman* (b), and *Spencer v. Barrough* (c). I am also of opinion that, independently of certain special objections to several of these subpoenas, they were further unnecessary, because the defendant could have obtained all the argumentative advantages he desired equally well from admitted copies of such notes as from originals. The cases in which such subpoenas and services have been allowed, as exceptions to the general rule, have all been decided on special circumstances, as *Story v. Holditch* (d), where the witness was also required to prove a general course of business in a Government office ; or as *Bastard v. Smith* (e), where witness was also required to explain ancient records, or on some other special grounds easily distinguishable from the present case.

2. The costs of the Judge's notes were also, I think, properly disallowed, because the rule *nisi* was obtained only on the ground that upon the finding of the jury the verdict should be entered for the plaintiff instead of for the defendant, and not on the ground that the verdict was against evidence, or any other ground founded upon, or rendering it necessary to obtain a copy of the Judge's notes.

3. The costs of the consultation desired by the defendant's counsel as to evidence, and the subsequent consultation as to moving to dissolve the rule *nisi*, seem to me not to be costs as between party and party, but only as between solicitor and client, and therefore to have been properly disallowed by the Prothonotary in this taxation.

4. As to the costs of instructions to the junior counsel to settle pleas, &c., and of attending for the same when settled, and several other small items claimed by this appellant, to be properly chargeable as between party and party ; although my own opinion is that a successful litigant should be reimbursed, and should receive from the unsuccessful party much more of all legal expenses properly incurred as between solicitor and client, than he receives according to the present rules of taxation, as between party and party ; still, in the absence of any authority, I am not entitled to introduce new rules or principles of taxation, but must decide according to the present established rules and principles. The present application must, therefore, be dismissed with costs.

(a) In Chambers.
(c) 9 M. & W. 425.

(d) 1 Scott, N. R. 206.

(b) 8 M. & W. 318.
(e) 10 Ad. & El. 213.

CASES
 ARGUED AND DETERMINED
 IN
 THE SUPREME COURT
 OF
 NEW SOUTH WALES,
 IN EQUITY.

BEFORE
 HIS HONOR JOHN FLETCHER HARGRAVE, ESQ.,
The Primary Judge in Equity,
 AND ON APPEAL TO THE SUPREME COURT.

1866.

FROST *against* HEALY and others.

March 9.

THIS was a petition by Mr. *D. R. Gale*, formerly the receiver and manager of the station property in question in this suit (*a*), but who had been discharged by the decree on the hearing. The petition prayed that a reasonable compensation might be awarded him for his services as such receiver and manager, and that he might be repaid certain moneys expended by him in connection with his appointment.

Mr. *Gale* was appointed receiver and manager by report, dated 23rd October, 1865; but the state of facts and proposal on which the report was founded, was allowed by the Master, as to the appointment, on the 25th of September, 1865, upon which Mr. *Gale* stated he immediately took steps for the fulfilment of his duties, and as to the salary (which was fixed by the consent of all parties, at £250 for one year certain), on the 11th of October following. The decree directing his discharge

A receiver or manager, with a salary fixed at a certain sum per annum, who has been discharged within the year, and before he has actually entered upon his duties, or received any of the income, is not entitled to a proportionate part of his salary for the time during which he held the appointment.

(*a*) See report of this case, 4 Sup. Ct. R., Eq. 6, 81.

1866.

FROST
v.
HEALY
and others.

was made on the 1st December, 1865 (a), but Mr. *Gale* did not receive notice of it until the 15th of that month.

It was stated by the petitioner that he had been put to considerable expense in the preparation of his outfit and otherwise, in view of proceeding to the station and performing his duties, and that in particular he had paid out of pocket upwards of £2, in matters connected with his appointment. The petitioner had no funds belonging to the estate in his hands, and was not indebted to it in any way. Since the decree the property had been under the management of *Paul Harford*, one of the defendants.

Paterson, for Mr. *Gale*, submitted that the salary being a sum fixed for a year certain, and not a percentage depending on the amount of income received, the petitioner was entitled to a proportionate part of the £250, for the time from the date of his appointment by the master's allowance of the proposal, or at all events from the date of the report, until he received notice of the decree, as well as to reimbursement of the moneys expended by him, as stated in the petition. *Richardson v. Ward* (b), and *Daniel's Ch. Pr.* (c) were referred to.

Stephen, for defendant *Harford*, consented.

Gordon for the plaintiff *Frost*, and *Owen* for defendant *Healy*, contended that the petitioner was not entitled to any allowance or compensation, as it did not appear that he had received any of the income, or had actually been engaged in any of his duties as manager of the property.

THE PRIMARY JUDGE. The petitioner asks the Court to order the payment to him, of a proportionate part of the annual salary allowed him by the Master, for the period during which he held the appointment of receiver and manager. The statements of the petitioner, with regard to his services, are very cautiously worded. He says he "took steps for the fulfilment of his duties,"

(a) 4 Sup. Ct. R., Eq. 82.

(b) Mad. & Geld. 266.

(c) 2 Vol., 1014.

that he incurred some trouble and expense in making preparations, "with the view of proceeding to the station;" but it does not appear that he ever actually entered on his duties as receiver and manager, or received any of the income of the property. Under these circumstances, had his salary been fixed at a per centage on the receipts, as is usually the case, Mr. *Gale* would not have been entitled to anything. And the fact that his salary has been fixed at a particular sum for the first year certain, makes no difference; because the fixed sum is allowed as a temporary measure, and would probably be replaced by a per centage after the passing of the first account, when the master would have ascertained the annual income of the property, and consequently been better able to fix a proper remuneration for the receiver at a per centage. The petition, therefore, will be dismissed, except as to the £2 expended by the petitioner, which will be repaid to him by the defendant *Harford*. As the point appears to be a new one, the costs of the petitioner and all parties will be paid out of the estate.

1866.

FROST
V.
HEALY

BROOKS and another *against* RICHARDSON and others (a).

December 14,
22, 23, 1865.
May 16, 1866.

THIS was an appeal by the plaintiffs against a decree of the Primary Judge, dismissing the bill with costs.

An auctioneer cannot appoint an agent to bid for an intending purchaser.

The bill was filed by *Richard Brooks* and *Henry Brooks*, against *Robert Pemberton Richardson*, *Edward Wrench*, and *John Morrice*, praying that the sale of a

R. and W. were auctioneers and also mortgagees of a station be-

longing to H. B. and R. B. On a sale of the station by R. and W., they nominated an agent to bid for M., one of their constituents, who became the purchaser.

Held, that the purchase by M. through the agent so appointed was void as against H. and R. B.

H. B. and R. B. being partners in a station property, the latter assigned his estate to trustees for the benefit of his creditors; but subsequently his estate was reassigned to him. The station was sold by the mortgagees, while H. B.'s estate was still in the hands of the trustees, who made no objection to the sale.

Held, that the reassignment gave H. B. a right to join with R. B. in a suit impeaching the sale.

(a) *Coram*, *Stephen*, C. J., *Hargrave*, J., and *Faucett*, J.

1866.

BROOKS
and another
v.
RICHARDSON
and others.

station and stock by the defendants, *Richardson* and *Wrench*, to the defendant *Morris*, might be declared to be fraudulent and void as between the plaintiffs and defendants, and that certain accounts incidental to the relief sought might be taken.

The facts of the case as appeared by the pleadings and evidence, were as follows:—

In the year 1861, the plaintiffs (*R. Brooks* and *H. Brooks*) were carrying on the business of graziers, at a station called Clifton, near Rockhampton, and the station and sheep on it were, on the 5th of May, 1861, mortgaged to Messrs. *Tucker and Co.*, to secure the sum of £500 or thereabouts, which sum was also secured by certain promissory notes. One of these becoming due in 1862, and Messrs. *Brooks* not being able to meet it, they applied to Messrs. *Richardson* and *Wrench*, station agents and auctioneers, to advance them the money to pay off this claim, which they agreed to do on having the sheep and stations placed in their hands for sale, in the usual way; and it was agreed that two bills should be given at six months date for the amount, and for the current expenses of the station, and that a mortgage of the sheep and station should be given to secure the payment of the bills. The sheep were represented to be 10,000, whereas in fact they were only 8,500.

It appeared that Messrs. *Gilchrist, Watt and Co.*, in March 1862, had advanced to the Messrs. *Brooks* £600, and that on the 29th of March in that year, in consideration of the £600, the Messrs. *Brooks* agreed to execute a preferable lien in their favour over the clip of 10,000 sheep, more or less, depasturing at Clifton, and to place the sheep and station in their hands for sale, subject to commission, to reimburse them the amount of the said advance, and any further advances they might make. Some further advances were made by Messrs. *Gilchrist, Watt and Co.*; but of the transactions with them, Messrs. *Richardson* and *Wrench* knew nothing.

The mortgage agreed to be given to Messrs. *Richardson* and *Wrench* was made on the 6th May, 1862, between *R. and H. Brooks* of the one part, and *Richard-*

son and *Wrench* of the other part. After reciting that the said mortgagors had applied to the mortgagees to advance them the sum of £6018 3s. 6d., which the mortgagees had agreed to do, upon having the payment thereof secured by two several promissory notes of the mortgagors' mentioned in the second schedule to the deed, and also by a mortgage of the said sheep and station and premises thereafter mentioned, the mortgagors in consideration of the said sum of £6018 3s. 6d. assigned to the mortgagees all the sheep, consisting in number of about 10,000, more or less, and enumerated in the first schedule to the said indenture, and the cattle and horses depasturing on the station, and the stations themselves, to hold the premises as a security for the repayment of the sum of £6018 3s. 6d. and interest, with a proviso for redemption on payment or retirement of the promissory notes, or any renewals thereof, and indemnifying the mortgagees against the same, and on the mortgagors performing the conditions and agreements therein contained on their part. And it was thereby agreed that if default should be made in the due payment and retirement of the notes or their renewals, or if the mortgagors should break or neglect to observe, perform, fulfil, and keep all or any of the covenants, conditions, provisions, and agreements therein contained on their part, then it should be lawful for the mortgagees without any further or other authority, and without any notice to take possession of the sheep and stations and premises, and either after or without taking possession, to sell the same by public auction or private contract, upon such terms as the mortgagees should think fit, and until sale to take care of and depasture the sheep, cattle, and horses. And the mortgagees were to stand possessed of the moneys to arise from the sale upon trust, to allow to themselves the cost of maintaining the station, and of the sale, with interest after the rate of £9 per cent. per annum, and a commission after the rate of £2 10s. per cent. on all moneys advanced or disbursed by the mortgagees, in respect of the premises; and in the next place, to pay or retain to themselves all principal or

1866.

BROOKS
and another
v.
RICHARDSON
and others.

1866.

BROOKS
and another
v.
RICHARDSON
and others.

interest money, which it might be necessary to pay or retain, in order to retire and pay the said notes, or either of them, or any renewal or renewals thereof, whether current or due or overdue—and then to pay the surplus, if any, to the mortgagors.

The two schedules to the deed were an enumeration of sheep shewing 10,030, and two promissory notes of the mortgagors—one for £2833 16s. 11d., and the other for £3184 6s. 7d., payable six months after date.

On the 1st of May, 1862, *R. Brooks* (for himself and partner) wrote a letter to Messrs. *Richardson* and *Wrench*, as follows:—

“DEAR SIRS—I beg to enclose you a description of stations and sheep at Queensland, on Clifton station, which, please dispose of for myself and brother, either by private sale or public auction, in or about July. I will give you any further particulars if you require them.”

On the 9th of May, Messrs. *Richardson* and *Wrench* wrote to Mr. *Henry Brooks*, who was on the station, informing him of the mortgage, and requesting him to send a power of attorney to his brother, for the purpose of rendering the transaction more perfect. There was the following postscript—“We may add, that we are instructed to bring the station into the market for sale, early in July next.” The power of attorney was executed on the 26th of May.

On the same day, *R. Brooks* wrote a letter to Messrs. *Richardson* and *Wrench*, in which he said, “The £600 promissory note to Messrs. *Gilchrist, Watt and Co.*, I always considered a claim on *Clifton*, although not secured. I give you this information as I deemed myself pledged to you, and my instructions as to the sale I hold as final.”

On the 27th of May, *R. Brooks* wrote a letter to Mr. *Wrench*, in which he said that he thought £12,000 the least price he ought to accept, and referred to some inquiry which it appeared Messrs. *Gilchrist, Watt and Co.* had been making of Messrs. *Richardson* and *Wrench*; and added, “I certainly would prefer a private offer

rather than a public sale, if the sum would be somewhat equivalent. But of course the matter is entirely in your hands, and I know you will do the best for me."

On the 14th and 21st of June, advertisements were inserted in the Sydney papers by Messrs. *Richardson* and *Wrench*, stating that the premises would be sold by auction, by direction of Messrs. *Brooks*, on the 1st of July.

On the 27th of June, Messrs. *Gilchrist, Watt and Co.* filed their bill against *R. and H. Brooks*, for a specific performance of their contract with them, and for an injunction to restrain their selling the premises; and on the 30th of June an injunction was granted, and thereupon Messrs. *Richardson* and *Wrench* paid the claim of *Gilchrist, Watt and Co.* for Messrs. *Brooks*, being requested to do so by a letter of that date from Messrs. *R. and H. Brooks*, in which they were directed to charge the same against the proceeds of stations and sheep in their hands for sale, and in which Messrs. *Brooks* undertook to pay them any deficiency that there might be between the amount realised and their claim, and such payment to Messrs. *Gilchrist, Watt and Co.*

The sale advertised for the 1st of July was proceeded with, when the highest price bid was 15s. 6d. a-head; but 16s. was afterwards offered by Mr. *Thompson*. The sheep and stations were not sold.

On the 3rd of July, Messrs. *Richardson* and *Wrench* wrote to Mr. *R. Brooks* (who had received the power of attorney to act for his brother) a letter, in which they said, "if we can't get more than 16s., we think you had better close the matter even at that unsatisfactory price than run any further risk by waiting."

On the same date, *R. Brooks* wrote to *Richardson* and *Wrench*, negating some offers that had been made, and saying that though he supposed he must sell, the person who should get it at 16s. would certainly have a bargain. In a postscript he said, "if *Thompson* won't wait, and you think he would come up, I will sanction anything you do for the best."

On the 12th July, *R. Brooks* wrote a letter to *Richardson* and *Wrench*, in which, after referring to several

1866.
BROOKS
and another
v.
RICHARDSON
and others.

1866.

BROOKS
and another
v.
RICHARDSON
and others.

matters connected with the carrying on of the station, he said, "But you are aware of all these points, and I rest myself contented in your hands."

On the 15th of July, the Messrs. *Brooks* wrote to Messrs. *Richardson* and *Wrench* as follows:—

"DEAR SIRS—With reference to our mortgage to you of the Clifton stations, at Rockhampton, with sheep and stock, &c., we hereby authorise and empower you forthwith to take possession of all the mortgaged property, and to manage the same as to you shall seem fit, *until you please to sell the same*. Under this arrangement you will send up to Rockhampton to the stations any agent you may choose to authorise. You will debit all expenses against the property, adding the same to the mortgage debt, and generally, against our account."

On the 21st of July Messrs. *Richardson* and *Wrench* wrote to Mr. *H. Brooks*, enclosing a copy of the last mentioned letter, and stating that they had empowered a Mr. *Brock* to take possession of the station, stock, and all the property mortgaged, and to carry on the same on their own account as mortgagees, until such time as they might have an opportunity of disposing of the station to advantage.

Messrs. *Richardson* and *Wrench* took possession of the sheep by Mr. *Brock*, in July or August.

On the 2nd of September, and frequently before that, an advertisement appeared in the *Sydney Morning Herald* stating that a sale would be made of the Clifton station on that day, by order of the mortgagees, with a note that the station was brought into the market for unreserved sale, and that it would be positively disposed of on the day mentioned. There never was any veto attempted to be put on the sale.

On the said 2nd of September the sheep and station were put up for sale by auction—Messrs. *Richardson* and *Wrench*, the mortgagees, acting as auctioneers—under conditions and terms of sale, by which the sheep were stated to be 8,994, more or less, and that the sale was made by order and on account of Messrs. *Richardson* and *Wrench* as mortgagees—one third of the purchase money to be paid down, and the residue to be

paid by bills of equal amount, at twelve and twenty-four months date, with bank discount, and secured by mortgage of the station. The purchaser was to take delivery within thirty days.

Mr. *Morrice* wishing to become a purchaser had requested Messrs. *Richardson* and *Wrench* to get somebody to bid for him, and limiting the amount he would give to 15s. 6d. a-head. Messrs. *Richardson* and *Wrench* got Mr. *C. E. S. Macdonald* to bid for Mr. *Morrice*, and the sheep and station were purchased by him for Mr. *Morrice*, he signing the contract as the latter's agent. The contract was subsequently signed by Mr. *Morrice* himself.

Prior to the sale to *Morrice*—viz., on 1st September, 1862—*R. Brooks*, by indenture of that date, assigned his estate to *H. Cox* and *M. C. Stephen*, upon trust, for his creditors. The sale of the 2nd September was sanctioned by Mr. *Stephen*, and never was objected to by Mr. *Cox* or any of the creditors.

On the 20th June, 1863, Mr. *Druitt* purchased the remaining assets of *R. Brooks* from Messrs. *Cox* and *Stephen*, for £1600, and they were by his direction conveyed to *R. Brooks*.

On the hearing, it was contended for the plaintiff that the sale to Mr. *Morrice* was fraudulent—a colourable sale, at a price greatly under the real value; that the defendants, *Richardson* and *Wrench*, prevailed on the defendant *Morrice* to consent to be the nominal purchaser; that the power of sale under the mortgage had not arisen; that the appointment of *Macdonald* to bid for *Morrice* was part of the fraudulent transaction; that such appointment rendered the sale to *Morrice* void, *Ex parte Bennett* (a); that the conditions of sale were not enforced; that the sum of 15s. 6d. was a gross undervalue, as was shown by a resale by *Richardson* and *Wrench* to *Mackenzie* and *Muldoon*, at 17s. 3d. a-head for cash, a short time after; and that the defendants had refused other better offers, and facilitated a resale by remitting some of the conditions of the first sale.

(a) 10 Ves. 381.

1866.
BROOKS
and another
v.
RICHARDSON
and others.

1866.

BROOKS
and another
v.
RICHARDSON
and others.

His Honor the Primary Judge (the late Mr. Justice *Milford*) was of opinion that this case of alleged fraud was not made out; that the evidence was insufficient to shew that *Morrice* was only a nominal purchaser, *i.e.*, a purchaser for *Richardson* and *Wrench*; that whether the power of sale under the mortgage had arisen or not, the letter of the 15th July authorised a sale at any time, and that in fact the sale was made by the mortgagees, as so authorised; and he held that the appointment of *Macdonald* by *Richardson* and *Wrench* to bid for *Morrice*, did not render the sale to him void (a). On these grounds the bill was dismissed with costs.

(a) His Honor in delivering judgment after negating the allegation of fraud on the part of the defendants, proceeded as follows to consider the case of *Ex parte Bennett*, in its application to the appointment of *Macdonald* to bid for the defendant *Morrice*.

"I will consider somewhat more at large the objection that *Macdonald* had been appointed to bid for *Morrice* by *Richardson* and *Wrench*, which, it was urged, the law will not allow. This was urged irrespective of any question of fraud, though the bill certainly is founded on fraud only.

The case of *Ex parte Bennett** was strongly relied on for the plaintiff, as showing that the defendants, whether in the character of auctioneers or trustees, could not appoint *Macdonald* to bid for *Morrice*, and that, therefore, the sale to him was void.

Although that case does not decide the abstract point that the solicitor of the vendor or a trustee for sale cannot appoint an agent to bid for a third person, but rests on the fact, that the person so appointed was a commissioner of bankrupt, the sale being made under the commission, yet the principle on which Lord *Eldon* reasons, applies equally under the circumstances of that case, though not of every case, to an agent holding that position. That he does not decide the case on the general principle appears from this. He says, 'If the solicitor cannot employ a commissioner, it is unnecessary to discuss whether he could employ any other person unconnected with the bankruptcy.' And when he lays down the general principle, he must have adverted to the case before him, where such principle expressed generally would apply, but not to cases where the general principle would not apply. I cannot think that he intended his observations to apply to every case where a trustee for sale might by possibility appoint an agent to bid for a third person. What he says in his judgment cannot, I conceive, apply to the case now before me. In *Ex parte Bennett*, General *Harris* wished to purchase the estate, and consulted his solicitor, who happened to be the solicitor to the commissioner of bankrupt under which the sale was to take place, and asked him to appoint an agent to bid for him. The solicitor did appoint an agent, but did not inform the agent that he was to bid for General *Harris*, so that the solicitor could have insisted, if disposed to act fraudulently, that the purchase was not for General *Harris*. Lord *Eldon*, very properly, would not have allowed a trustee or solicitor to make such an appointment, an appointment which he could turn to his advantage by afterwards declaring that the purchase was made for some person other than General *Harris*. In the present case the intended purchaser was made known to the agent, and the trustee or auctioneer could never have turned the purchase to his ad-

* 10 Ves. 331.

The plaintiffs having appealed against this decree, the case now came on for hearing before the full Court.

The *Attorney General* and *Gordon* for the appellants. It is clear that the sale now impeached by the plaintiffs was unwarranted. It was made by *Richardson* and *Wrench*, in their character of mortgagees. But as no default had been made by the plaintiffs under the conditions of the mortgage, the defendants (*Richardson* and *Wrench*) had no authority to sell. But the circumstances shew, further, that the sale to *Morrice* was fictitious and fraudulent. There was no intention that *Morrice* should be the actual purchaser; for before his purchase was completed *Richardson* and *Wrench*, without any authority from him, negotiated through *Buyers* the sale to *Mackenzie* and *Muldoon*. The auctioneers subsequently sent up an agent to the station, who says that he was employed by them, although *Morrice* says

vantage. The auctioneer's book was signed for *Morrice*. The agent was the agent of *Morrice*, not of a third person, only, however, to the trustee or auctioneer.

The principle applicable to purchases made by trustees for third persons does not apply to a case like this case. In those cases the Court conceives it possible that the person, for whom the purchase is made, may be put by the vendor in a position which would be unfair to the *cestui que trusts*, by the trustee giving or withholding improper information, or otherwise influencing the sale. Where an agent is appointed by the trustee to bid for some undiscovered principal, the transaction cannot stand for the reason I have given, but the principle cannot be stretched to the case of the appointment by a trustee of an agent at the request of a known principal.

Under such circumstances there is no inducement for the trustee to act unfairly by his *cestui que trusts*. As soon as the agent is appointed, he might as well make any unfair representation to the principal as to the agent. They both represent an intended purchaser who is precisely in the position of any other purchaser who may bid at the auction. The trustee has no more inducement to give information to the one than the other, or to influence the sale.

Sir *E. Sugden*, in citing the case of *Ex parte Bennett*, appears to doubt whether it establishes the general proposition that a trustee for sale cannot appoint an agent to bid on behalf of a stranger; and when we consider the every-day practice in the auction room, when the auctioneer so frequently, at the request of an intended bidder, is requested to appoint somebody to bid for him, I should be sorry to think the proposition contended for as established.

In considering this part of the case, I have not made any distinction between a solicitor for a vendor, a trustee for sale, or an auctioneer, for the same principle applies to all persons in fiduciary situations.

I do not think that the sale to *Morrice* is void, because *Macdonald* was appointed by *Wrench* to bid.

I need not consider the question which was argued before me, whether *Richard Brooks* under the circumstances of this case can institute the suit with his brother, seeing that I support the sale to *Morrice*."

1866.

BROOKS
and another
v.
RICHARDSON
and others.

December 14,
22, 25, 1865.

1886.

BROOKS
and another
v.
RICHARDSON
and others.

that he was employed by him. It is probable that *Morrice* lent his name to the transaction, with the understanding that he should share in the profits of the resale; for, in a conversation with *Nicholson*, he says, in reference to the sale, that "he only cleared £100 by it"—a circumstance which throws a suspicious colour on the transaction. There was no proper consent to the sale on the 2nd September. The defendants, *R.* and *W.*, must be considered the plaintiff's agents in the resale, and must not be allowed to pocket the profits. But in any event the sale of the 2nd September was void, in consequence of the appointment of *Macdonald* by the auctioneers to bid for *Morrice*. The principle laid down in *Ex Parte Bennett* establishes this beyond question. It would be extremely dangerous to hold that that principle did not apply to auctioneers as well as to all others in a fiduciary capacity. If auctioneers were at liberty to appoint bidders for their constituents, they would be tempted to sell the property at an under value, or to a particular person whom they might wish to favour, or to one who would be likely to place the property in their hands for resale, so that they might get two commissions instead of one. In this case *Morrice* might have repudiated the sale, and then what protection could the plaintiffs have had. Also the non-enforcement of the conditions of sale on *Morrice* was dangerous to the plaintiffs, and would have been fatal to the validity of the sale; *Ex parte Bennett* (a), *Hesse v. Briant* (b), *Billage v. Southbee* (c), *Spence's Equitable Jurisdiction* (d), *Re Bloye's Trust* (e), *Ex parte Badcock* (f).

Sir *W. M. Manning*, Q.C., and *Stephen* for the defendants. The defendants are free from any suspicion of fraud. The sheep were sold for only 6d. a-head less than the plaintiffs were anxious to have got on another occasion, and whether the one sale or the other took place there could not be anything coming to them. [*Per Curiam*. We all relieve the defendants from

(a) 10 Ves. 383-396. (b) 2 Jur. N. S. 925; 6 De G. M. & G. 623.

(c) 9 Hare. 540.

(d) 2 Vol. 943.

(e) 1 McN. & G. 494.

(f) 1 Mont. & Mac. 239.

arguing the question of actual fraud.] Omitting the sums paid by *Stephen* and *Cox*, the trustees of *Richard Brooks*, amounting to £822, there is still about £1000 due from the plaintiffs to the defendants, *Richardson* and *Wrench*. A decree for the plaintiffs would be nugatory, when it is seen that, in any event, the balance would be in favour of the defendants. There is a misjoinder of plaintiffs. The reconveyance to *Richard Brooks* could not vest in him a right to bring a suit to impeach this transaction. If it was void, it was void only against the trustees, in whom his estate was vested at the time of the sale to *Morrice*. If they consented, or took no objection to that sale, he was bound by their act, and the reconveyance only vested in him his former estate as affected by that act; *Calvert* on Parties (a). The bill is grounded entirely upon fraud, and not on any objection of a technical nature as that derived from the case of *Ex parte Bennett*. If the plaintiffs had intended to rely on that point, they should have stated it distinctly in the bill. But as they have chosen to rest their whole case on charges of actual fraud, they cannot now depart from that ground and rely on merely legal objections; *Price v. Berrington* (b), *Glascott v. Lang* (c), *Wilde v. Gibson* (d). Lastly, this case is easily distinguishable from *Ex parte Bennett*. *Macdonald* was in no way bidding for the auctioneer, nor could either he or the plaintiffs be prejudicially affected by his appointment to bid a certain sum for *Morrice*. The defendants, *R.* and *W.*, had a right to sell as mortgagees; and the appointment alluded to, at all events, preserved the estate from being sold for less than *Morrice* was willing to give for it. It did not prevent the station from fetching a higher price. Neither was the principal in this case, as in *Ex parte Bennett*, an undiscovered one, so that there could be no danger of *Macdonald* repudiating his acting as agent for *Morrice*. The breaches of covenant upon which the mortgagees were entitled to sell, are stated in the affidavit

1866.

BROOKS
and another
v.
RICHARDSON
and others.

(a) p. 224.
(c) 2 Phil. 310.

(b) 3 McN. & G. 498.
(d) 1 H. L. C. 605.

1866.
 BROOKS
 and another
 v.
 RICHARDSON
 and others.

of the plaintiff *Richard Brooks*, in the suit of *Gilchrist v. Brooks*. But they had abundant authority to sell, irrespective of the mortgage. They had, first, express authority from both plaintiffs. After *Richard Brooks'* assignment, it was for his trustees (Messrs. *Stephen and Cox*) to object to or sanction the sale. They had paid £822 on account of the plaintiffs, and were interested in the surplus. These trustees attended the sale, but took no objection, nor was any objection made till nine months after the sale, when *Richard Brooks* got his estate re-assigned to him.

The *Attorney General*, in reply, referred to *Espy v. Lake* (a), as qualifying *Wilde v. Gibson* (b), *Sugden's V. and P.* (c). *Richard Brooks* always has had an interest contingent on payment to the creditors.

Cur. adv. vult.

May 16.

Their Honors now gave judgment as follows :—

STEPHEN, C. J. After considerable hesitation, I have arrived at the same conclusion as my colleagues in this case, that the purchase by *Morrice* through *Macdonald*, he having been an agent to bid at the auction appointed by the defendants, was void as against the plaintiffs; and that the latter are entitled to a decree in their favour.

The facts are so fully stated by the late Primary Judge, that it is sufficient merely to refer for them to his judgment (d); and I shall assume, with his Honor (as indeed I entirely believe), not only that there was no fraud in the sale—a point decided already by us on the hearing,—but that the price given was probably a fair one; that is to say, as much (although this must be matter for inquiry) as could at the time have been obtained at auction, under any circumstances. I do not doubt, also, that the practice among auctioneers generally, without the least suspicion of its illegality, is to nominate bidders for intending purchasers. Mr. Justice *Milford* mentions the fact in his judgment, and I perso-

(a) 10 Hare 260-264. (b) 1 H. L. C. 600. (c) 2 Vol. 890.

(d) The statement of the facts in this report has been taken from his Honor's judgment.

nally know instances of the occurrence. Nor, if we reject the idea of actual collusion, is there anything extraordinary—or morally wrong—in an auctioneer's dealing with and for third parties, in that manner. If unable or unwilling to attend a public sale, I inform him of the sum which I am prepared to give, and request him to get some one in the room to bid for me. The advantage seems, here, to be wholly in favour of the person selling; for the auctioneer, it is probable, having the knowledge thus acquired, will not allow the article to be knocked down at a less price. And it does not alter the case, that the intending purchaser is an habitual buyer at auctions, or has money in the auctioneer's hands, as *Morrice* had, ready to profit by any such speculation.

I am nevertheless unable to resist the conclusion, which the authorities appear to establish, that, on general considerations of expediency and policy recognised by the law, the system is objectionable and cannot be upheld. It is a wise and well-settled rule, that persons in a fiduciary position shall not occupy any other, which may by possibility in any degree conflict, in duty or interest, with the particular duties of that position. But if an auctioneer, or the vendor's solicitor or trustee, at a sale, might effectually appoint a third person to bid, the chances of collusion and fraud would be increased; since such appointments are easily made, where the purchase is really for the party appointing—though ostensibly effected for a stranger. The two positions, moreover, are plainly antagonistic in character; for the bidder's duty must be, in every such case, to purchase for his principal at the smallest price possible. Now, in the present case, the defendants *Richardson* and *Wrench* clearly acted in a fiduciary character, whether they sold the property as auctioneers by specific instruction, or as mortgagees under their security. In the latter event, they were unquestionably trustees; and in either case, their duty was to procure the largest price attainable, not from one bidder only, but from all the persons present. These defendants, therefore, could not purchase the property for

1866.

BROOKS
and another
v.
RICHARDSON
and others.

1866.

BROOKS
and another
v.
RICHARDSON
and others.

themselves—either directly or indirectly. Their employment or duty is to sell. Can they, then, although not for their own benefit or on their own behalf, employ an agent to buy? That (however technical the point may appear) is the question; and I am compelled to answer it in the negative.

The case of *Ex parte Bennett* (a), as observed by Mr. Justice *Milford*, does not expressly determine the question; for the final decision merely was, that a person occupying there a fiduciary character referentially to the sale could not himself bid—even as a mere agent only. But there are passages in the judgment, indicating the opinion of Lord *Eldon* that such a person, if engaged to sell, or to advise or otherwise assist the seller, could not appoint even a stranger to bid (b). In Lord *St. Leonards'* learned treatise on Vendors (c), this case is cited doubtfully for the position. He who cannot purchase an estate for himself, as principal (says the text), cannot “perhaps” employ an agent to purchase it, even for a stranger. But, in the recent case of *Hesse v. Briant* (d), Vice-Chancellor *Stuart*—in reference to a vendor’s solicitor, after citing *Ex parte Bennett*—says, that such a person is “not permitted to buy, either for himself or another. He cannot buy for anybody. His business is to sell; not to employ any other person to buy for another.” On the application of this rule to the particular circumstances, the decision in *Hesse v. Briant* (e) was overruled by Lord *Cranworth*; but the rule itself was approved of, and stringently enforced, by the Lord Chancellor. The general principle will be found explained in *Spence’s Eq. Jur.* (f). See also *Downes v. Grazebrook* (g), and *In re Bloye’s Trust* (h).

It was objected, that the bill in this case is founded on charges of fraud—actual not constructive merely; and that the merely technical fraud, so to call it, or breach of trust by the defendants, in themselves causing the property to be brought, but for a stranger, is nowhere relied

(a) 10 Ves. 333.

(c) 2 Vol., 11th ed. 390.

(e) 6 De G. McN. & G. 628.

(g) 3 Meriv. 209.

(b) See the report, pp. 385, 400, *ubi sup.*

(d) 2 Jurist N. S. 925.

(f) 2 Vol., pp. 300, 943.

(h) 1 McN. & G. 495.

on by the plaintiffs as a ground of suit. We cannot adopt this argument. It appears to us, that the fact of *Macdonald's* employment being stated, among other circumstances relied on to invalidate the sale (although charged as part of the alleged collusion and scheme of fraud), is sufficient to enable the Court to make a decree avoiding that sale. It was further objected for the defendants, the mortgagees, that they are clearly shown by the evidence—even if credit in account be given, as desired, for the difference between the prices obtained at the sale and resale respectively—to be still largely in advance for the plaintiffs. But this is a matter of account, simply, to be inquired into by the master. It forms no bar to a decree, for the main object of this suit; but is incidental and subordinate.

1866.
BROOKS
and another
v.
RICHARDSON
and others.

We are also of opinion that *Richard Brooks* is properly joined with *Henry* in the bill. For, although at the time of sale his share in the property was assigned, and the partnership with his brother thereby dissolved, the re-assignment of his estate vested in *Richard* all the interest in one moiety of that property, or its proceeds, which would have remained in him but for his assignment. The partnership, indeed, did not revive; but all the rights which—as to that moiety—were in the transferees, and which continued in them up to the time of the re-assignment, came back to him unaffected by the transfer. And among those rights, we conceive, was that of uniting with *Henry* in a suit to defeat the sale, if they thought proper to institute one. The sale was not void (it was said), except as against the actual vendors, or their representatives; and at their election. But we hear of no election by the assignees of *Brooks*, after knowledge of the facts or otherwise, to confirm such sale. There has, certainly, been no confirmation by himself. How, then, can his election—jointly with *Henry*—to impeach the sale be destroyed, by the mere fact that at the time of sale his right was in another person?

On the other points in controversy, we are with the defendants. The auctioneers appear, on the evidence, to have had as agents a clear authority to sell; expressly

1866.

BROOKS
and another
v.
RICHARDSON
and others.

given to them, more than once, by the then managing partner. They had the same power, also, as mortgagees; by reason of the various breaches of covenant, enumerated by *Richard Brooks* himself in his affidavit, made to oppose *Gilchrist's* motion, and used by both the brothers in answer to that application.

The result is, by the judgment of my learned colleagues and myself, that the plaintiffs are entitled in effect to the decree sought by them; although its exact form may remain for discussion, or may perhaps be agreed upon by the parties, on the settlement of the minutes. Substantially it will be, that the defendants do account for the fair marketable value of the property, to be ascertained by the master. And there will be a reference to him, to take an account of what may be due to the defendants *Richardson* and *Wrench*, under their security. We think that, as the plaintiffs have charged all the defendants with concerted actual fraud, and have insisted that not only was the proceeding to a sale by auction without authority, but that the sale to *Morrice* relied on was fictitious and collusive, which charges have in our opinion wholly failed, we ought to give no costs—either of the suit, or on the appeal.

HARGRAVE, J. The general principles of equity applicable to cases of this nature have been long established by unquestioned decisions; and the remarks of Lord Chancellor *Eldon*, in *Ex parte Bennett*, on the precise point raised by the defendants in this suit, have always appeared to me to be so clearly included within those principles of equity, that I only think it necessary to state that in my opinion this Court ought most scrupulously to maintain *Ex parte Bennett* and the other authorities to their full extent.

If an auctioneer should be allowed (as in this case) to nominate one person to bid for an intending purchaser up to a specified amount, whether known or not known to the auctioneer, why should he not nominate any number of such bidders on behalf of other intended purchasers up to other specified amounts; and, if so, it is obvious that

a wide door will be opened to bad faith towards vendors, and partiality towards, or collusion among, these nominees of the auctioneer ;—necessarily resulting in these practical results, viz., that an auction sale, especially of a mortgaged property, without a reserved price, as in this case, will become a mere delusion as regards the public—a gross mockery as regards all the parties beneficially concerned—and a grievous snare as regards the unfortunate mortgagor.

While I concur with my colleagues upon the evidence in fully acquitting the defendants of all moral or actual fraud in the sale now set aside, I still think that all the details of this transaction are so pregnant with suspicion and hasty action on the part of the defendants, that I have had great difficulty in satisfying my mind that there has not been some degree of constructive fraud in the sense in which that term is understood in Courts of Equity. I also much doubt whether all the minor points of law and equity raised during the argument against the sale, have been sufficiently answered by the defendants.

Nevertheless as the unanimous decision of the Court is founded entirely on the dicta in *Ex parte Bennett*, and on only one of the facts of the bill alleged, in paragraph nine of the bill as constituting the plaintiffs' equity for relief, I think the justice of the case is, under the circumstances, sufficiently satisfied by the decree without costs.

FAUCETT, J. In reference to the question on which the decision in this case has mainly turned, it is sufficient for me to say that, having very carefully considered the authorities, I fully concur in the conclusion arrived at by my colleagues. On the other points I also concur in the judgments just delivered.

1866,
BROOKS
and another
v.
RICHARDSON
and others.

1866.

July 5, 1866. In the matter of the will of PHILLIP SULLIVAN, and of the Trust Property Act of 1862.

A testator, after directing the payment of his debts by his executors out of his estate generally, made a specific devise of certain real property to an infant, and devised and bequeathed the residue of his realty and personalty to his executors and trustees, on certain trusts, giving them also power to sell his real estate when they should think advisable, and before sale to demise the whole or any part thereof. Previous to his death the testator deposited the title deeds, as well of the specific devise as of lands included in the residue, as an equitable mortgage, to secure a debt. On the trustees seeking the advice of the Court as to the mode of dealing with testator's property, for the payment of this debt, *Held* that the specific devise, as between itself and the residuary devise, was charged with its proportionate share of the debt, and that in case the personal estate was insufficient for the payment of testator's debts, the deficiency should be borne by all the property subject to the mortgage, as well that specifically devised as those included in the residue, in proportion to their respective values. Trustees *advised* that such values might be ascertained by respectable valuers, and the deficiency raised by mortgage or otherwise.

THIS was a petition under the 80th section of the Trust Property Act of 1862 by *James Logan* and *Peter Shea*, the executors and trustees of the will of *Philip Sullivan*, of Tenterfield, praying for the opinion, advice, and direction of the Court, as to the mode in which the testator's property should be dealt with, for the purpose of paying a certain debt due from the testator at his death to the firm of *Sir D. Cooper and Co.*, and secured to that firm by the testator having deposited the deeds of certain valuable freehold properties by way of equitable mortgage.

The provisions of the will, dated 20th May, 1863, so far as related to this application, were as follows :—

The testator first directed the payment of his just debts, funeral and testamentary expenses, as soon as conveniently might be after his decease *out of his estate generally* by his executors above named. After two pecuniary legacies, the testator devised a certain freehold wharf and premises at Grafton, called the Newby and Grafton Wharf, to *Norah*, the eldest daughter of his brother, *John Sullivan*, absolutely, but in case of her death before attaining twenty-one years, then to his said brother *John Sullivan*. The testator then devised and bequeathed all the residue of his real estate, and all his personal estate, to the executors, the trustees of his will, upon certain trusts, for the benefit of his widow and infant children, and to pay certain annuities to his father and others, as directed by the will. This residuary clause was followed by a direction and power to his said trustees, or trustee for the time being, when they should think it expedient, advisable, or beneficial so to do, to sell his real

estate, and also to convert his personal estate, or any part or parts thereof, either together or in parcels, &c., and to invest the proceeds of the whole in securities; the interest upon which was to be applied for the benefit of the testator's widow and children and annuitants, as before mentioned, with powers of maintenance and advancement. Lastly, the will contained a power to the trustees, at any time before sale of the testator's said personal estate and real estate as aforesaid, to demise all or any part thereof at rack rents, &c., &c.

1866.

In the matter of the will of P. SULLIVAN, and of the Trust Property Act of 1862.

The testator died on the 3rd of April, 1865, having previously deposited with the firm of Sir *D. Cooper and Co.*, as security for a debt amounting to about £800, the deeds not only of properties included in the residuary devise, but also of the property specifically devised to *Norah Sullivan*.

Norah Sullivan was an infant at the date of this application. The estimated value of the specific devise to her was stated by the petitioners to be about £900, and the value of the other properties so charged by deposit about £400; under these circumstances the petitioners were desirous of being advised as to whether they were entitled, under the powers vested in them by the will, to take any steps for the purpose of changing the specific devise to *Norah Sullivan*, with its fair proportion of the debt due to Sir *D. Cooper and Co.*, and if so what steps they should take for that purpose, and upon what basis such proportion should be computed.

The PRIMARY JUDGE in delivering his opinion stated the facts of the case as above, and the substance of the will, and continued—

The proper marshalling of debts, as between specific and residuary devisees, in cases such as the present, has been very much considered in the case of *Mirehouse v. Scaife* (a), before Lord Cottenham, in 1837, followed by the cases of *Tombs v. Rock* (b), *Emus v. Smith* (c), and *Edwards v. Pugh*, cited in the note to *Jarman* on Wills (d). See also *Williams* on Executors (e). I

(a) 2 M. & C. 695.

(b) 2 Coll., C. C. 490 (1846).

(c) 2 De Gex & Smail 723 (1848). (d) 2 Vol., p. 527.

(e) 2 Vol., p. 1541-2.

1866.

In the matter
of the will of
P. SULLIVAN,
and of the
Trust Property
Act of 1862.

believe that all these cases were subsequently discussed before the late Primary Judge, Mr. Justice *Milford*, in the case of *Tunks v. McRoberts* (a) ; all the papers in which case I have read, and I am of opinion—upon the true construction of this will and the authority of the above case—

Firstly, That the estate specifically devised to *Norah Sullivan* is charged with and must bear (as between her and the residuary devisees) its proportionate part of the mortgage debt due to Sir *D. Cooper and Co.* ; and

Secondly, That in case the personal estate of the testator is not sufficient for payment of his debts, including the said mortgage debt, the deficiency due on the said mortgage ought to be borne by the whole of the testator's real estate, subject to the said mortgage, as well that specifically devised to *Norah Sullivan* as that included in the residuary devise ; and that the executors may, under the powers of this will, raise the said deficiency by mortgage or otherwise accordingly ; but that as between *Norah Sullivan* and the residuary devisees, the said deficiency should be apportioned between the said specific devises and the residuary devise, in proportionate amounts of the whole deficiency, according to the value of such devised estates respectively, as was directed by the decree in *Tunks v. McRoberts*.

I also think that the executors may ascertain the value of such estates respectively through respectable valuers, as I directed in my judgment on *Usher's* will, February 7th of the present year (b).

The costs of this application are to be paid by the executors out of the general personal estate of the testator.

(a) April 1858.

(b) 4 Sup. Ct. R., Eq. 86.

NORTON and others *against* HUGHES and others (a).
By amended bill.

December 11,
12, 1865.
Aug. 7, 1866.

THIS was an appeal to the full Court by the defendant, *Esther Hughes*, from a decree of the Primary Judge, declaring that certain lands—viz., two farms called *Cobbity* and *Redmire*, with 175 acres adjoining—which she claimed in her own right, formed part of the residuary trust estate of *Samuel Terry*, and directing her to admit the plaintiffs (*James Norton* and *Rebecca Henderson*), her co-trustees, into joint possession with her of these lands, and to account for the rents of the same received by her, or which she might have received, but for her wilful neglect and default, and to pay the amount found due on taking the accounts.

Statute of Limitations no defence to bill by trustees and *cestui que trusts* against co-trustee where the trust is express. *S. T.*, by his will made in 1824, devised two farms called C. and R. to *H. M.*, in tail, and by a subsequent devise gave certain lands specifically mentioned, and "all and

singular other his messuages, farms, lands, and hereditaments of every description, *not thereinbefore disposed of* by him, and wheresoever lying and being, and *whether in possession, remainder, or expectancy*," to *E. T.* (his heir at law), in tail. By a codicil made in 1834, *S. T.* expressly revoked the devise in tail, to *E. T.*, and devised by name the same lands given by his will to *E. T.*, "and all other his real estates *not otherwise disposed of* by his will or this codicil," to trustees in fee, on certain trusts. By another codicil made in 1836, *S. T.* partially revoked the last mentioned trusts, substituting a trust for *E. T.* during life, and after his decease to the heirs of his body, and in case of the said *E. T.*'s death without issue he devised "the same real estate to all the children of *J. T.*, *J. T. H.*, and *M. F. H.*, who should be then living as tenants in common," and directed his trustees "upon such event to convey the said estate unto and to the use of each of the said children accordingly."

S. T., the testator, died in February 1838, having survived *H. M.*, who left no issue. In March 1838, *E. T.*, the testator's heir at law—to whom it was supposed by all parties the farms C. and R. had descended, by lapse of the devise to *H. M.*—conveyed them for value to *J. T. H.*, one of the trustees, who then entered into possession of the said farms and 175 acres adjoining, also now claimed as part of the residuary estate; and in 1844 all these properties were settled on *E. H.*, the wife of *J. T. H.*, to her separate use. *E. T.* died in November 1838, without issue. *J. T. H.* died in 1851. In 1854 his widow, *E. H.*, became one of the trustees of *S. T.*'s will. From 1838, *J. T. H.* and *E. H.* held possession of and dealt with the two farms, C. and R., and the 175 acres as their own—no objection to their possession being made by any of the trustees or *cestui que trusts*, until sometime after *E. H.* became trustee. The original bill was filed in 1862.

In suit by trustees and *cestui que trusts* against *E. H.*, *Held* (*Hargrave*, J., *dissentiente*), that the farms C. and R., as well as the 175 acres, were part of the residuary estate of *S. T.*, and were held by *E. H.* and co-trustees upon an express trust, within the meaning of the 25th section of the Statute of Limitations, and that the *cestui que trusts* were not barred from claiming them by the lapse of twenty years.

Held also (*Hargrave*, J., *dissentiente*), that by the devise in *S. T.*'s codicil of 1836, to the "children" of, &c., they took an estate in fee.

Held, that there can be no acquiescence where all parties are ignorant of their rights. Under the circumstances of the case account directed against *E. H.* for six years only, from the filing of amended bill.

(a) *Coram*, *Stephen*, C. J., *Hargrave*, J., and *Fancett*, J.

1866.

NORTON
and others
v.
HUGHES
and others.

The principal facts of the case and the arguments upon the points of law involved, together with the judgment of the full Court on appeal in the original cause, are reported 2 Sup. Court Reports, Eq., p. 65.

By the judgment on appeal in the original suit (which was instituted only by the two trustees, *James Norton* and *Rebecca Henderson*, against *Esther Hughes*, their co-trustee), the Statute of Limitations was held to be a bar to the relief sought by the plaintiffs, as the bill was then framed; but leave was given to amend, by adding as parties plaintiffs, the *cestui que trusts* under the will of *Samuel Terry*.

The bill was amended accordingly. The names of *R. R. Terry* (one of the original *cestui que trusts*), *W. W. Billyard*, *T. W. Smart*, *H. Osborne*, *A. Osborne*, *P. H. Osborne*, and *B. M. Osborne*, all of whom were entitled though assignments from the original *cestui que trusts* to certain shares of the testator's residuary estate, were added as co-plaintiffs. The other *cestui que trusts*, who had not parted with their interests—viz., *S. Hughes*, *E. R. Hughes*, and *E. M. H. Lawry*—having declined to join in the suit, were made defendants. Statements were introduced shewing the transmission of their respective interests to the parties not taking immediately under the will.

The defendant, *Esther Hughes*, by her answer, submitted that the lands in question were not part of the testator's residuary trust estate, but passed to his heir-at-law, *Edward Terry*, by whom the farms of *Cobbity* and *Redmire* were conveyed to her husband, *J. T. Hughes*, in 1838, in consideration of certain claims, which the latter had, in right of his wife against the estate of the testator; that thereupon the said *J. T. Hughes* took and continued to hold possession of these farms as his own, under the conveyance and not as trustee; that she herself had possession of the whole of the properties since 1844, under a deed, for her separate use; and that the said properties had always been occupied and dealt with by herself and her husband as their own property, without question by the plaintiffs or any of the *cestui que trusts*. The defendant, *Esther Hughes*, further claimed

a title by adverse possession, independently of the conveyance to her husband, and submitted that the plaintiffs were barred by the Statute of Limitations, 3 and 4 W. IV., c. 27, s. 2 and 24; that the 25th section of that Act did not apply to this case—the properties not being held on an express trust; and that in any event the plaintiffs were disentitled to relief on account of their acquiescence and laches for so long a time.

The appeal having now come on for hearing,

1866.
NORTON
and others
v.
HUGHES
and others.

December 11,
12, 1865.

The *Attorney General* and *Gordon*, for respondents, objected *in limine* to any argument on the substantial points of the case. These have been already decided by the full Court on the former appeal (a). The judgment of the Court was that, upon certain amendments being made in the suit, the relief sought against *Esther Hughes* would be granted. These amendments have now been made, and the Court is bound by its former decision; *Fisher v. Thornton* (b).

Sir *W. M. Manning*, Q. C., and *Blake* for appellants. There has been no former decision in this amended suit, except the decree of the Primary Judge, against which the present appeal is brought. The parties to the original suit are not the same as those now before the Court. New parties have been introduced whose rights will be determined, and who will be themselves bound by the decision on this appeal. They are, therefore, entitled to a full discussion of the points at issue, whatever may have been the decision in the original suit; and the appellants' right to the same benefit must be co-extensive with theirs.

Per Curiam. Our judgment on the former appeal was only that the then plaintiffs could not succeed. We suggested certain amendments, and expressed the opinion that if the amendments were made the defendant would be liable. But as new parties have been introduced, and a new decree taken, we are bound to hear the case fully, and all the points are therefore open for argument.

(a) 2 Sup. Ct. R., Eq. 65, 73. (b) 2 Sup. Ct. Rep., C. L. 131, 139.

1866.

NORTON
and others
v.
HUGHES
and others.

The case was then argued upon all the points (a).
The following authorities were cited and commented upon by

Sir *W. M. Manning*, Q. C., and *Blake* for appellant. *Smith v. Jones* (b), *Malone v. O'Connor* (c), *Bright v. Legerton* (d), *Townshend v. Townshend* (e), *Beckford v. Wade* (f), *Lewin on Trusts* (g), *Drummond v. Duke of St. Albans* (h), *Sugden's Real Property Statutes* (i), *Giles v. Giles* (k), *Archbald v. Scully* (l), *Dixon v. Gofan* (m).

The *Attorney General* and *Gordon* for respondents. *Jarman on Wills* (o), *Salter v. Kavanagh* (p), *Petrie v. Petrie* (q), *Hamilton v. Wright* (r), *Duke of Leeds v. Earl Amherst* (s), *Marker v. Marker* (t), *Walker v. Simons* (u), *Cholmondeley v. Clinton* (v), *Wedderburn v. Wedderburn* (w), *Attorney General v. Fishmongers Co.* (x), *Thomas v. Thomas* (y), *Doe d. Milner v. Brightwen* (z), *Lewin on Trusts* (aa), *Cockerell v. Cholmeley* (bb).

Sir *W. M. Manning*, Q. C., in reply. *Purves v. Lang* (cc), *Stone v. Godfrey* (dd), *Bowes v. East London Waterworks Co.* (ee), *M'Carthy v. Desain* (ff).

HARGRAVE, J., referred to *Stewart v. Stewart* (gg), and *Clifton v. Cockburn* (hh).

Cur. adv. rult.

(a) See arguments and cases cited in original suit, 2 Sup. Ct. Rep., Eq. 67, 68.

(b) 33 L. J. Ch. 580.

(d) 30 L. J. Ch. 343.

(f) 17 Ves. 95.

(h) 5 Ves. 438.

(l) 1 Dr. & W. 152.

(o) 1 Vol. 550.

(g) 1 Drew. 393.

(s) 2 Phil. 123.

(u) 3 Swanst. 64.

(w) 4 Myl. & Cr. 52.

(y) 1 Jur. N. S. 1162.

(aa) p. 140 note.

(cc) 1 Sup. Ct. R., Eq., App. 6.

(ee) 3 Mad. 375, 384.

(gg) 6 Cl. & F. 968.

(c) 9 Ir. Ch. 469.

(e) 1 B. R. C. C. 552.

(g) pp. 737, 751.

(k) 1 Dr. & W. 135, 139.

(m) 17 Beav. 421.

(p) 1 Dr. & W. 668.

(r) 9 Cl. & F. 122.

(t) 9 Hare 16.

(v) 2 Meriv. 362.

(x) 5 Myl. & Cr. 17.

(z) 10 East 583.

(bb) 1 Russ. & M. 425.

(dd) 5 De G. M. & G. 90.

(ff) 5 Myl. & K. 621.

(hh) 3 Myl. & K. 100.

On this day, judgment was delivered as follows :—

STEPHEN, C. J. This suit, in its present amended form, is instituted by two of the trustees of the estate of the late *Samuel Terry* under his will and codicils, and by the *cestui que trusts* now interested, or such of them as have thought fit to join, against the other trustees and *cestui que trusts*, for the purpose (mainly) of compelling *Esther Hughes*, the defendant trustee, to account for the rents or profits of three landed properties—being two farms called Cobbity and Redmire, and about 175 acres adjoining—which it has been recently discovered form part of the testator's residuary estate. Of these three properties, it is conceded, Mrs. *Hughes*' husband in his lifetime had possession, claiming them in his own right, from the year 1838 to his death in 1851; and she has herself ever since held possession of them, under a similar claim—and, until of late, in ignorance of the existence of any other.

The facts of the case are stated in the late Primary Judge's judgment, pronounced in the original cause in the year 1863; and will be found reported, with the judgment of the full Court as then constituted on the Appeal, in the second volume of *Wilkinson and Owen's Reports, Equity (a)*. But the leading facts are simply these: *John Terry Hughes*, the defendant's husband, being a trustee under *Samuel Terry's* will, and having, as such, the testator's residuary estate vested in him jointly with the other existing trustees, but believing the three farms in question to form no part of that estate, took a conveyance to himself of Cobbity and Redmire (two of those properties) for a consideration stated in the deed, from the testator's heir-at-law, who had no title whatever to dispose of them. Under colour of that conveyance, he entered into and retained the possession which has been mentioned, of those farms. How, or by what supposed title, *Hughes* also became possessed of and claimed the 175 acres, there are now no means of ascertaining; but it is certain, that he in like manner occupied the latter as his own. And, on his

1866.

NORTON
and others
v.
HUGHES
and others,
August 7.

(a) pp. 65, 70.

1866.

 NORTON
and others
v.
HUGHES
and others.

death, Mrs. *Hughes*—under what title does not appear, nor is any suggested—took, and has ever since retained, possession of the whole. But, in the year 1854, she became herself a trustee of *Terry's* will; and shortly afterwards it was discovered—so it would appear—that the three properties never passed to the heir, and that *Hughes* therefore could not have acquired a title, individually, to any of them.

By *Terry's* will, the farms of Cobbity and Redmire had been devised to *Henry Marsh*, the brother of Mrs. *Hughes*, in tail. All the testator's estates, not otherwise disposed of, he gave by codicil to *Hughes* and others, in trust for *Edward Terry* (the testator's son) for life; but, in case of the latter's death without issue, then in trust for the children of *Hughes* and two others. *Henry Marsh* dying before the testator, without issue, it was supposed that those farms—instead of coming under the residuary devise—descended on *Edward Terry*; who accordingly, in March 1838 (the testator having died in February), executed the conveyance in question. In November following, *Edward* himself died without issue. There is nothing to show that the other trustees, still less the *cestui que trusts*, knew anything about the 175 acres until after *Hughes'* death; as these, unlike the Cobbity and Redmire farms, were not mentioned specifically in the will. With respect to the two latter properties, however, it seems clear that all parties alike believed them to have devolved, by *Marsh's* death, on the testator's heir; and hence, probably, if they knew of that conveyance, *Hughes'* unquestioned possession under it.

It was contended for the defendant, that she is not liable to account for these properties, or any of them, as trustee; that the plaintiffs are barred by acquiescence, or by laches during so long a period; that they are, at all events, barred by the Statute of Limitations—3 and 4 W IV., c. 27, sections 2 and 24; and that section 25 of the statute does not apply, as there was here (with respect to these properties) no express trust.

The devise in this case—on which the question last mentioned turns—is of all the testator's residuary estate

(he having given specifically to other devisees sundry properties, and among these the two farms named) to *John Terry Hughes* and three other persons, on trust for his son *Edward* for life, and afterwards the heirs of his body; and, failing them, for all the children of *Hughes*, *John Terry*, and *Martha Hosking*, who should then be living, as tenants in common. Now, whether the lands in question (the 175 acres or the other two farms) were included in this residuary devise, might or might not have been matter of debate. But, if included, they are on the same footing as all the other lands forming the residue. The residuary estate was devised on specific, that is to say, *express* trusts. How, then, can it be maintained that the trustees—whether those originally appointed, or those subsequently succeeding to the position—hold or ever held the lands, on a trust arising by implication only?

It was urged, on behalf of the defendant, that the lands in contest were always supposed, by herself and her husband, to be their own; and the fact is conceded. Not merely so. *Hughes* purchased the property, from a person supposed to be the owner; abandoning, in consideration of the acquisition, claims then vested in him in right of the defendant, which now by the lapse of time are lost. She has, moreover, been in undisturbed, if not recognised possession (including *Hughes'* before her own), to the knowledge of her co-trustees, for above twenty-three years. And although these lands are now discovered to be—and consequently always to have been—part of the residuary trust estate, yet the defendant accepted the position of a trustee in ignorance of the fact, and of the new liability thereby unhappily assumed by her.

All these circumstances give the defendant a strong claim on our sympathy. But how do they alter the character of that position, or affect the question of her liability thence arising? If the other lands, forming part of the residue, became vested in her on a stated and defined (in other words an *express*) trust, it surely follows that those are also vested alike on the same trust.

1866.

NORTON
and others
v.
HUGHES
and others.

1866.

NORTON
and others
v.
HUGHES
and others.

The adverse argument would amount to this: that the defendant holds the former lands on an express trust, because she knows them to be within the trust; but that the latter are not so holden, because, in the absence of such knowledge, and believing the lands to be her own, by gift from her husband, or otherwise through him, she has claimed and occupied them as her own. Or it must be founded on this; that as to, at all events, the two farms named—they became part of the residue because only of a lapsed devise, and therefore were not included in the trust except by subsequent matter, extrinsic to the codicil and will. And so, that they form no portion of the created express trust.

There is nothing to justify, in favour of this defendant, such a construction of the term used in the statute. It would follow, on that construction, that she and her co-trustees hold the lands in question, under the same exact words, in different characters; they on an express trust, but the defendant on merely an implied one—which would be absurd. Or it must be maintained, that no part of the residuary estate was devised on an express trust. For, if the land in contest became by any means vested in the trustees, as a portion of the residuary estate—the trust applicable to which is clearly an express one—these must equally be vested on an express trust. And this in all the trustees alike; notwithstanding that the defendant may have taken possession, and always in good faith claimed the land, in her own individual right alone.

The right of the *cestui que trusts* in this case, therefore, is in my opinion not affected by the statute of limitations. And I am further of opinion that no laches—but certainly no acquiescence—can here be imputed to them, such as to bar their claim in this suit; although the delay may, not unfairly, all the circumstances considered, be a ground for limiting the period of liability. It seems clear on the authorities, that no person can be precluded from relief by acquiescence, and consequently not by mere neglect (unless for a much longer time than is supposed here), who has not been cognisant of his

rights. We may assume, that all the objects of the trust attained majority, the youngest of them, in or before 1858—and necessarily before November 1859. The bill was filed in 1862. But, in this case, the parties were all alike, it appears (the trustees as well as their *cestui que trusts*), under a common ignorance as to their rights ; and, if so, it matters not when the children became of age. The existence of any such right, indeed, was probably not suspected, until parties recently acquiring interests made the discovery. With respect to the 175 acres, nothing whatever seems to have been known about that farm until a very late period.

It is possible that the then trustees (one of them, Mrs. Terry, having been party to *Hughes'* conveyance), thought that the arrangement of 1838, having regard to the consideration stated in the deed, was beneficial for all parties ; and knowledge of the transaction may, reasonably enough under the circumstances, be attributed equally to her colleagues. But neither knowledge nor acquiescence on their part, I need hardly observe, even if they knew that the heir had no title to the property, can prejudice the claims of the persons whom they represented, and who are now suing.

On the whole case, therefore, I am of opinion that the plaintiffs are entitled to these lands, and consequently to the account prayed for ; but that it ought to be restricted, as suggested in the former judgment of the Court, to six years before the filing of the amended bill. I think, moreover, that the Master should have liberty to report, specially, as to the value of any permanent improvements by the defendant on the properties ; although not undertaking now to say, that she can have any allowance made to her on that score.

The opinions of my brethren and myself on this occasion not being unanimous, I have thought it my duty to go through all the cases, so far as they touch the several points argued ; and have prepared, in a separate paper, an abstract of those cases—to which the parties may, if they desire it, have access. The paper has been submitted, of course, to my learned colleagues ; but I do

1866.
NORTON
and others
v.
HUGHES
and others.

1866.

NORTON
and others
v.
HUGHES
and others.

not think it necessary to prolong this judgment by the citation (a).

(a) The following is the paper referred to by his Honor :—

In *Townsend v. Townsend** the plaintiff claimed under a settlement by his Grandfather, made after a second marriage, whereby the residue of a term of years in certain lands was assigned to *W. R.* and *N. R.*, in trust for the settler's children by that marriage. It appeared that the grandfather afterwards conveyed these lands in fee (the second wife being a party to the conveyance), to the use of *W. T.*, his eldest son by the first marriage. And then *W. R.*—reciting that *N. R.* was dead, and that the uses declared by the former settlement were at an end—assigned the residue of the term to *R. S.*, to protect the uses newly created.

Under these instruments, *W. T.* and after him his widow as his devisee, had been in possession of the land for about thirty-five years. The bill was then filed against her, and the representative of *R. S.*, to declare them trustees for the plaintiff, a son by the second marriage. It is clear, however, under the circumstances stated, that neither of these parties could be such a trustee, if at all, except by implication or construction only. The Court decided, accordingly, in favour of the defendants. This was obviously no case of express trust; and therefore the claim of the plaintiff, assuming it to be in other respects well founded, was necessarily barred by the lapse of time. But the Court thought, also, that the settlement relied on by him was without consideration, and so avoided by the second—which seems to have been regarded as executed for value.

The case of *Beckford v. Wade*† was still more clearly, if possible, that of a constructive trust, and nothing more. It was contended there, that the circumstances under which certain conveyances were executed made the defendants, in legal contemplation, trustees for the parties injured. Most plainly, a case of that kind could not be one of actual trust, and therefore it could not be an "express" one, in any sense of the word.

But what can entitle us to say, if there be a trust in this case at all, that such trust is other than an express one? There is no difficulty here about the existence of a trust. Its objects are ascertained; the persons are plainly indicated, and so is the extent of their interest. Nothing is uncertain, but the properties which form the subject of this trust. Now, suppose that a testator devises four farms, specifically, to named individuals; and then a fifth farm described, with all his other farms, to trustees—for parties also named. He dies, leaving (it is supposed) seven farms only. It will be admitted, that the fifth farm passes to these trustees on an express trust. But if so, what renders the trust not an express one, as to the sixth and seventh? Yet, without extrinsic evidence, the fact could never be ascertained that these formed a portion of the residue. Eventually, it is discovered that the testator had an eighth farm. Can ignorance of the existence of this, at and after the time of the death, render the trust respecting it a constructive trust merely?

In *Petrie v. Petrie*,‡ Vice Chancellor *Kindersley* held that there was no case of express trust; and that therefore—after the lapse of twenty years—the statute applied. But, if that case be examined, it will be found that the contest was not between the *cestui que trust* (or plaintiff claiming so to be) and any trustee whatever. The defendant was the widow and devisee of *Edward Petrie*; and the devised lands, of which it was sought to declare her a trustee, having been in the said *Edward's* possession ever since the year 1815, were by him in 1829 (upon their marriage) settled on her. They continued, after *Edward's* death, in the defendant's possession till the year 1850; when the bill was filed. If the plaintiff was entitled to the property (as to which

* 1 Br. C. C. 552.

† 17 Ves. 95.

‡ 1 Drewry 303.

HARGRAVE, J. The plaintiffs' bill prays this Court to make a declaration, that the lands and hereditaments, specifically mentioned in the three schedules to the bill, form part of the residuary estate of the testator, and as such are subject to the trusts of his will; and that the

1866.

NORTON
and others
v.
HUGHES
and others.

there existed great doubt), it was as heir at law of *George Petrie*; whose title, if any, was derived from *G. W. Petrie*, under a settlement dated the 10th January, 1788. By that instrument, the legal estate was vested in a trustee for him, subject however to a term of years, and to a certain life interest.

Now the first question was, whether *G. W. Petrie* had not himself in the same year, 1788, parted with the property. If he had, it was confessedly vested in *Edward* in 1815, in his own right. But, if he had not, it seems clear from what has been stated, that the defendant never was, nor was *Edward*, a trustee (express or constructive) of it, at any time, for any one. If a trustee at all, the defendant could only have been so by construction.

The case was cited, I believe, simply because of some remarks by the Vice Chancellor, reported in page 393. But it will at once be seen, referentially to the nature of the case, that these have no application here. He says, "The 25th section is confined to express trusts; that is, trusts expressly declared by some instrument. It does not mean a trust that is to be made out by circumstances." And then the Vice Chancellor goes on to point out the distinction thus: "If a person has been in possession, not being a trustee under some instrument, but still under such circumstances that the Court, on the principles of equity, would hold him to be a trustee, then the 25th section does not apply." This supplies no authority for the position, that an express trust does not exist here; where the trust itself, both as to its nature and objects, is in terms declared, indicated, or meant so to be.

In *Malone v. O'Connor** the original trust (if there was one) was created by words of recommendation, accompanying a devise of land to Lord *Sunderlin*, from *A. M.*, who died in 1776. Lord *Sunderlin* paid no attention to the recommendation, and died seized of the property in 1816, leaving two sisters his heirs at law. *R. M.*, who was or claimed to be entitled to the benefit of that recommendation, insisting that it created a trust in his favour, filed a bill against the sisters in 1820. Then (all parties supposing that there was no other claimant), a compromise was affected; and, in consideration of a large annuity, the sisters executed a conveyance, by which *R. M.*—subject to certain estates for life, and in tail—took the disputed lands in fee. *R. M.* died in 1834, leaving the property to the defendants; and against these the suit was instituted, in 1857, by a person claiming to be entitled on *R. M.*'s death, under the limitations in the original trust or recommendation.

The Lord Chancellor *Napier* dismissed the bill, on the ground, mainly (as I understand the case), that the statute of limitations was a bar; citing *Lewis v. Thomas*,† and *Cholmondeley v. Clinton*.‡ If so, the Chancellor must have been of opinion that this was not the case of an express trust. But why? Because the possession of *R. M.* was not manifestly referable, under the circumstances, to title in him under the testator *A. M.*; and the relation of *cestui que trust* and trustee, at any time, between him and the sisters of Lord *Sunderlin*, or between the plaintiff and those claiming under them, was a question of doubt and difficulty—and such as could only be established, if at all, after an enquiry into obscure matters of fact. For these reasons, the Court also thought the plaintiff barred by the rules respecting laches,

* 9 Ir. Ch. 464.

† 3 Hare 33.

‡ 2 Jac. & W. 155.

1866.

NORTON
and others
v.
HUGHES
and others.

defendant, *Esther Hughes*, may be decreed to account for the rents of such hereditaments received by her since the death of the testator, &c., &c.

The defendant submits, by her answer, that these hereditaments did not pass under the said will as alleged,

saved by section 27 of the statute. A still stronger view of the case indeed was taken; for the Chancellor held, that *R. M.* (who clearly never was a trustee) took the sisters' reversion or supposed reversion in fee, as a purchaser for value. So that the plaintiff was also barred, as against him and claimants under him, by the express words of section 25.

That decision, consequently, is no authority against the *cestui que trusts* in the present case. And *Burroughs v. McCreight** is still less to the purpose. There, an express trust was created in favour of the plaintiff, among several others, of certain undivided parts of a farm, in the year 1810. But the defendants were not trustees, nor sued as such. They claimed for valuable consideration, under a person who had obtained possession of the land (the whole of it), by colour of a conveyance to him of an undivided fourth part; their own conveyance being from that person, of three-fifths of the land in 1812, and from the persons entitled to the remaining two-fifths, in 1819. It appearing that the defendants, and those from whom they claimed, had been in possession of the whole for above twenty years (the suit not having been commenced until 1842),—Sir *Edward Sugden* dismissed the bill, holding that the plaintiffs were barred by the statute. Under the circumstances stated, the case seems to have been a clear one for dismissal.

In *Bright v. Legerton*† there was an express trust; although, according to the Lord Chancellor, no continuing trust. But the case was decided in favour of the trustees (or rather their executors, for the trustees themselves had been long since dead), both on the ground of lapse of time, and of distinct acquiescence. It is clear on the authorities, that lapse of time alone will in some cases constitute a bar to relief, notwithstanding the existence of an express trust; and such cases are within the 27th section. The acts or omissions complained of, however, in the case cited—each being much more than twenty years old—involved no charge of fraud in the trustees, or of personal advantages obtained by them. The complaint was that they had neglected to do certain things, of such a nature and at a time so distant, that the trustees themselves if alive (and therefore still less their representatives), could scarcely be prepared to supply evidence or explanation respecting them. So that, as Lord *Campbell* observed, there was great risk of a miscarriage of justice, if the matter had after so many years and under such circumstances been gone into.

That case is, consequently, not in any degree in point. Here, there are no new facts to be discovered; and the question is, whether the defendant (she being an express trustee) shall be allowed to retain possession of trust property, for her own personal benefit. If to be deemed a purchaser from her husband, she has been such twelve years only. But he was also an express trustee; and could not, therefore, be taken to have held the property in any other character. He could neither purchase it from himself, nor for himself.

The case of *Wedderburn v. Wedderburn*‡ is not much to the purpose; but it establishes this—that where an express trust is created (in that instance, one to invest certain proceeds for the benefit of the testator's children), the parties beneficially interested are not barred by time, or even, if not fully acquainted with all the facts, by releases executed after attaining majority. *Satter v. Cavenagh*,§ however, is almost directly in point. There the testator devised his property to *S. R.* for 99 years, on sundry

* 7 Ir. Eq. 51. † 30 L. J. n. s. Ch. 339. ‡ 4 Myl. & Cr. 52. § 1 Drury & Walsh 683.

but descended to the testator's heir-at-law, *Edward Terry*, and were claimed and dealt with by him accordingly; and in particular that the said *Edward Terry*, as such heir-at-law, by an indenture dated 17th March, 1838, duly conveyed Cobbity and Redmire to *John*

1866.

NORTON
and others
v.
HUGHES
and others.

trusts; one of which was, to pay the testator's son and daughters specified annuities—and, if the daughters should die childless, then the testator gave the property absolutely to the said *S. R.* The son died in the testator's life time; and from 1791 up to 1820, when one daughter died, *S. R.* (and after his death his son, and afterwards the latter's personal representatives) received the rents and paid the annuities. In 1835 the other daughter died, having also duly received her annuity. It was held by Lord *Plunkett*, that the daughters were in their life time entitled as the testator's heirs to the surplus rents; that (in other words) there was a resulting trust in favour of the daughters; and that this, since it could be collected from the will itself, was an *express trust*.

The Court further held, that *S. R.* and his representatives were trustees of the freehold, as well as of the term; and consequently, that they were liable to the representatives of the daughters (one of these having died leaving children, who were plaintiffs in the suit), for the entire rents since the death of the first in 1820. Now, that was apparently as hard a case on the trustee, or rather his representatives, as the present. *S. R.*'s son doubtless thought himself entitled to the surplus rents; and, as the married daughter was continually absent in America, the fact of her having children was probably unknown to that son—or, at all events, to the widow and children who were his innocent devisees.

The case illustrates two rules. One, that wills are to be considered—with respect to the state of a testator's family, and the intended objects of his bounty—as speaking from the time of his death only; and the other, that a trust is either express or constructive, according as it can or cannot be collected from the will itself. But there is nothing to sanction the notion that a declared trust is not an express one, as to any particular property, because the *subject matter* of the trust cannot be ascertained from the will; or because that property was given to one person by the will, and has only fallen into the residue by reason of his death. And the Court, following the first mentioned rule, might infer in this case that *Samuel Terry*, since *Henry Marsh* died in the testator's life time, meant that the property given in terms to him should fall into the residue.

The case of *Cholmondeley v. Clinton** is sufficient to show (see p. 362) that there can be no such thing as *acquiescence*, binding on the assenting party, where he is unconscious of his rights. *Laches*, though they may have the same effect, are not (except in some peculiar cases) evidence of acquiescence—which is an act of the mind. A party acquiescing waives his own right, intentionally, in another man's favour. But no length of time can, as matter of fact, show acquiescence; although, under the statute of limitations, or on principles of equity, lapse of time may operate equally to bar claims by a recognised force of its own. All the cases cited on this point are to the effect stated. How can a person, indeed, be taken to have acquiesced in (that is, assented to or ratified) another's title, if ignorant that any right existed to impeach it; or be said to have waived a claim, which he did not at the time know that he possessed?

Where, then, are the *laches* in the present case? All the *cestui que trust* (I understood it to be admitted) have not been of age above a few years. But, be this as it may, there is nothing to show any delay, after discovery of the common mistake as to the law, which led originally to the assumption of ownership complained of. The following is

* 2 Meriv. 351.

1866.

NORTON
and others
v.
HUGHES
and others.

Terry Hughes in fee simple, in consideration of his relinquishment of certain valuable claims, which he had then, against the estate of the testator in respect of certain cattle formerly belonging to *Marsh*, but then vested in the said *J. T. Hughes*, in right of his wife, the defendant

the language of Lord *Cottenham*, in *The Attorney General v. The Fishmonger's Company*,* "In questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the principles of justice and the interests of mankind require that the utmost regard should be paid to the length of time, during which there has been enjoyment inconsistent with the existence of the supposed trust. One of the principal reasons for admitting limitation of suits is, the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power. Upon that principle this Court has, in many instances, limited the period within which it will exercise its power; and it would indeed be strange, if, in cases in which the Court has not done so, it were altogether to disregard the lapse of time, as applicable to the evidence upon which it is called upon to act." But, distinguishing between such cases and those which resemble the present, his language is equally strong against trustees. "If there be no doubt as to the origin and existence of a trust, the principles of justice and the interests of mankind require that the lapse of time should not enable those who are mere trustees to appropriate to themselves that which is the property of others." Whether such an appropriation be the result of fraud, or misconception of a right, the rule I conceive is necessarily the same. The trustee of a residue cannot appropriate any portion of it, and rest his defence on a mistake, whatever its nature.

Bovces v. East London Water Works† was a suit by a *cestui que trust* against trustees, and certain tenants claiming under them, to set aside two leases, as having been beyond the trustees' powers. It appeared that, for nine years after coming of age, the plaintiff had received the rents; and this was relied on as acquiescence, barring his right to relief. But Sir *John Leach* held, that, as the *cestui que trust* had not during that period full knowledge of the imperfection of the leases, his claim was not barred. Because of such recognition, however, and the accompanying delay, the account was directed from the time of filing the bill only. In *Clifton v. Cockburn*‡ the facts were of a very different character. Many payments had there been made, under a mistake as to the construction of a settlement. But there had been several years of distinct acquiescence. One of the authors of that settlement was dead; family arrangements, moreover, had proceeded on the faith of the received construction. Under such circumstances, Lord Chancellor *Brougham* refused to direct the refunding of those payments. But the general rule as to confirmation by acquiescence is thus stated, in *Cockerell v. Cholmeley*,§ by Sir *John Leach*, M. R., "In Equity it is considered, as good sense requires it to be, that no man can be held by any act of his to confirm a title, unless he was fully aware not only of the fact upon which the effect depends, but of the consequence in point of law."

On the other hand, a compromise or agreement fairly arrived at, with full knowledge of all the circumstances, is ordinarily not relieved against (especially after having been acted on) merely by showing ignorance of the law; *Stewart v. Stewart*.|| But that was not a case between trustee and *cestui que trust*; and, if it were, this is no case of compromise or agreement. In like manner, if he mistakes the law, but is fully aware of all the matter on which the question depends, and de-

* 5 Myl. & Cr. 17, 18.
§ 1 Rus. & Myl. 426.

† 8 Madd. 375.

‡ 8 Myl. & K. 101.
|| 6 Clk. & Fin. 268.

Esther Hughes. She further states, that *J. T. Hughes* entered upon Cobbity and Redmire only after and under this deed, and not as a trustee under the testator's will, and that these properties have always been dealt with by her husband and herself as vested in them and their alienees under the said deed of March 1838; and that she herself has had possession of these properties and enjoyed them for her separate use, under a trust deed dated 13th April, 1844, and in no way under the testator's will or codicil.

The defendant also submits that none of the plaintiffs, nor any one through whom any of them claim, has had possession of any of the properties claimed within twenty years next before filing the said bill; and she claims the benefit of the Limitations Act, 3 and 4 W. IV., c. 27, as adopted in this colony, 8 W. IV., No. 3, and also of 21 Jac. 1; and she also claims and has acquired a right to

1866.
NORTON
and others
v.
HUGHES
and others

liberately agrees to waive his right, or to confirm a given state of things, he is not permitted afterwards to recede from that agreement; *Stone v. Godfrey*.* There is no pretence for saying, that the present is a case of that description.

Doenges v. Bullock† is an authority that the lapse of twenty-four years is no protection to trustees (notwithstanding that family arrangements had been entered into, on the footing of the then supposed state of things), where the parties were under misapprehension as to their rights. That case resembles the present, in another respect; that the trustees, acting as executors under a clause by no means clear in its terms, had by a wrong construction of it been led to make payments, in exclusion of a party entitled to share in the fund. That fund, no doubt (a residue), was ascertained and known:—but, that the person represented by the plaintiffs was so entitled, the trustees clearly did not know. Yet it was held, that the case fell within section 25 of the statute, as one of express trust.

In *Lister v. Pickford‡* the question was whether certain acres of land—supposed, until recently, to be included in a specific devise, and dealt with accordingly—were not a portion of the residue, of which the defendants were trustees. Now, the tenant for life of the specifically devised lands, it was proved, took possession of these acres as part of them, in perfect good faith, in 1842; and the bill was not filed until 1864. From the year 1850, the defendants had been in possession of the land (supposing it to form part of the specific devise), under a power in the will—to protect the interests of the person next entitled. But it was held that their mistake made no difference in the case; that the defendants always held these acres, since they were in fact part of the residue, on the same trusts as the other portions of it; that the defendants could not hold them in any other character; and therefore, that they were liable to the *cestui que trust*, for the rents received by them.

I am unable to distinguish, on principle, the difference between these last cases and the present, as to the objection of laches or acquiescence raised by the defendant.

* 5 DeGex. McN. & G. 90. † 25 Beav. 61; and 9 H. L. C. 3. ‡ 34 L. J. Ch. 583.

1866.

NORTON
and others
v.
HUGHES
and others.

the said estates by adverse possession, as well as through the conveyance from the testator's heir-at-law, as above mentioned.

For the consideration of this very important case it will be necessary to distinguish the estates of Cobbity and Redmire, as distinct from the 175 acres, the former being admittedly included in the express terms of the second codicil, and devised thereby to *Henry Marsh* and the heirs of his body.

The residuary devise under which the plaintiffs claim is contained in the second codicil, dated 5th July, 1836, which codicil it is necessary to set out as follows:—"I, *Samuel Terry*, do hereby revoke so much of my will and the codicil thereto as relates to *the undermentioned estates and properties*. And I do hereby give, devise, and bequeath to my wife, *Rosetta Terry*, the house and premises wherein I now reside, situated in Pitt-street in the town of Sydney, and to her heirs and assigns for ever. I give, devise, and bequeath to my son *Edward Terry*, his heirs and assigns, the cottage in Castlereagh-street, Sydney, in which he now resides, absolutely and for ever. I give, devise, and bequeath to my daughter, *Martha Foxlow Hosking*, her heirs and assigns, the house in Pitt-street, in which she resides, and also the house in the occupation of Dr. *Bland*, and the small house between them, with all and singular the appurtenances—and also the estate called Macquarie Field, purchased by me from *James Musham*, absolutely and for ever. And whereas by my said will or codicil, or one of them, I did give and bequeath all my real estate (not specifically otherwise disposed of) to the trustees therein named, upon trust for my said son *Edward Terry* for life, and at his decease to the heirs of his body, and if failing his issue to my own right heirs. Now I hereby revoke and annul such part of my said bequest as relates to my own right heirs. And I do hereby, give, devise, and bequeath the same real estate in the event of my said son's death without issue, to all the children of *John Terry* of Box Hill, and of my nephew *John Terry Hughes*, and of my daughter *Martha Foxlow Hosking*,

who shall be then living, share and share alike as tenants in common; and I direct my said trustees and the survivor of them, and the heirs and assigns of each survivor, upon such event, to convey the said estate unto and to the use of each of the children of *John Terry*, *John Terry Hughes*, and *Martha Foxlow Hosking*, accordingly."

Now, under this codicil and the facts of this case several most important questions have arisen, viz.—

First, as to the extent of interest devised to the "children" of the three persons named in the residuary clause of the second codicil; *Secondly*, as to the lapsing of Cobbity and Redmire into such residuary devise, or whether such estates descended upon the heir-at-law; *Thirdly*, as to the operation of the Limitation Act upon this trust devise, *i.e.*, whether the trust is an express trust as to these three estates, or whether it is only a constructive trust; and *Fourthly*, as to the effect of the equitable doctrines of acquiescence and laches upon the plaintiffs' claim, assuming that such claim cannot be successfully resisted on the other grounds above mentioned.

The first question which this Court has to decide, upon the construction of the residuary devise contained in the third codicil, is with reference to the degree of interest taken by the beneficial devisees, viz., all the children of *J. Terry*, of *J. T. Hughes*, and of *Martha Hosking*, who shall be living at the death of *Edward Terry* without issue, share and share alike as tenants in common. For in order to get rid of the conveyance by the heir-at-law in March 1888, the plaintiffs must make out conclusively that the beneficial devisees took freeholds of inheritance and not mere life estates; and therefore that the heir-at-law had nothing in him to convey by that indenture to *J. T. Hughes*. It will be admitted that under the general rule as to all wills before the Wills Act, the word "children" did not carry more than a life estate. See *Jarman on Wills* (a). In fact this rule is indisputably clear, and has been universally

1866.
NORTON
and others
v.
HUGHES
and others.

(a) Vol. 1., p. 483; Vol. 2, p. 210; 11 Bythewood by Sweet, p. 382.

1866.

NORTON
and others
v.HUGHES
and others.

acted upon as the general rule down to *Dowling v. Vincent* (a), 14th December, 1865.

I understand, however, that the exceptional authorities relied upon in the present case, as conferring upon these nine children a fee simple of inheritance, are *Challenger v. Sheppard* (b), *Hutchinson v. Stephens* (c), *Knight v. Selby* (d), *Hodson v. Ball* (e), and *Moore v. Cleg-horn* (f).

These are the authorities cited by *Jarman* (g), in support of the following proposition in the text, viz. :—
“That where lands are devised to trustees in fee in trust for a person, without any words of limitation, the *cestui que trust* takes an equitable interest co-extensive with the legal estate of the trustees, *i.e.*, a fee.”

Now I cannot for an instant suppose that Mr. *Jarman* meant this sentence to extend in a degree beyond its terms, or beyond the simple case put in the text. To impute any further meaning would be a most dangerous principle, and destructive to all our established rules of construction ; and indeed the most cursory examination of the authorities cited will show that this simple case alone was within Mr. *Jarman*'s meaning, and the simple case alone is within either the text or the authorities.

Or, in other words, I cannot think that Mr. *Jarman* intended to state *as law*, that in all cases where there is a devise to trustees and *their heirs in trust*, and to *cestui que trusts* by name, the latter *must* take a fee simple of inheritance by implication ; that is, that the beneficial estates need not be limited in the usual way, but will be commensurate with, and measured by the estate devised to the trustees, contrary to every rule of construction, no less than to the established rule that the heir-at-law takes whatever is not expressly or by necessary implication devised away from him.

In *Challenger v. Sheppard*, the devise was to trustees in fee, “in trust for *Joan*, the wife of *John Pippet*, and *James*, her son,” with directions for separate use of *Joan*,

(a) 1 L. R. Eq. 442 ; 1 W. R.

(b) 8 T. R. 597 ; 3 Scott 407 (1800).

(d) 3 Man. & Gr. 92 (1841).

(f) 11 Jur. 958 ; 12 Jur. 591 (1848).

(c) 1 Keen 240 (1836).

(e) 14 Sim. 558 (1845).

(g) Vol. 2, p. 224.

and maintenance of her son ; “ and after the decease of the said *Joan*, the trustees should permit and suffer the said *James* to enter upon and enjoy the whole as soon as he attains the age of twenty-one years.”

This case was a simple devise as I have stated, and the direction to enjoy the “ whole ” had great weight in the decision given.

In *Hutchinson v. Stephens*, the devise was not only the perfectly simple case of a devise to trustees in fee upon trust for *H. J.* for life, with remainder to the children of *H. J.* ; but there was an additional clause that the devise should go over, *if H. J. should die without leaving any lawful issue of his body at the time of his decease*—a clause which showed conclusively that the testator intended his grandchildren, the children of *H. J.*, to take transmissible interests ; or, as the Master of the Rolls said, the interest of the testator was to make a provision, by way of settlement, for the family of *H. J.* In the present case there are no such additional words.

In *Knight v. Selby*, the devise was also one and indivisible, as follows—viz., as to any messuages, lands, tenements, and real estate (singular), describing them, not hereinbefore particularly mentioned, the testator devised them “ upon the following trusts : First, for the use of my wife *Helen*, for her life, and after her decease to the use of the said *J. M.* and *T. M.*, and the children of the said *W. M.* and *M. R.*, in equal shares and proportions.” The Court said the parties who claimed as tenants in common, by devise, against the heir-at-law, must make out the affirmative. All the Judges held that the special use of the word “ real estate,” and the introduction, threw light on the subsequent words.

In *Hodson v. Ball*, the devise was to all testator’s own “ children,” but there were very special directions that if any such children, *and their issue*, should die in the lifetime of any husband or wife with whom his children should have intermarried, he gave their shares to his surviving children and to the issue of such of his children as should be then dead ; it being his will that none of his sons’ wives or daughters’ husbands should become

1866.

NORTON
and others
v.
HUGHES
and others.

1866.

NORTON
and others
v.
HUGHES
and others.

heirs to their children's property. The Vice-Chancellor thought it plain, from these subsequent and special directions as to the issue of children, showed an intention to give an inheritable interest.

Moore v. Cleghorn was also still more strikingly a single devise, for the sole words were, "I give and devise my freehold piece of land at, and also my copyhold, &c., which has been surrendered to the uses of this my will, unto *E. A.* and *J. E.*, their heirs and assigns, for ever, upon trust, for the use and benefit of my natural boys," *R. R. C.*, *J. P. C.*, and *M. C. C.* The Lord Chancellor said—"It is quite clear here that the testator intended his boys to take all which he gave to the trustees. So also where the testator intended to give a life estate, he does so carefully." The Lord Chancellor here expressly guards himself, by saying that he decides only the simple question, "that where a testator gives an estate in fee to trustees for the use of others, those others take the fee." All these cases are most ably considered in 11 *Bythewood* 382—387; and their result is that these indefinite devises in wills before the new law are only thus enlarged to estates in fee by construction or implication, either by force of the word "estate" used in the very words of the devise and in a possessive sense, that is where its omission would take away the operation of the gift, or where the gift to the trustees and the *cestui que trusts* are contained in one simple devise, as in *Moore v. Cleghorn*. And certainly the Courts have never shown any inclination to strain the interpretation of wills beyond these limits as against the heir at law.

Applying these authorities to the present will and codicils, it seems to me:—

First, that the gift to the children is contained in a codicil dated 1836, two years after the gift to the trustees in 1834; and therefore in this respect altogether distinguishable from the authorities. Second, that all that is given to the trustees is not given to these children, for there is an intermediate estate tail to *Edward Terry* for life, and at his decease to the heirs of his body. Thirdly, the frame of this will and codicil are the very

opposite of the wills in the cases cited ; for in this codicil there is, first, a distinct devise to the children of the three persons mentioned and described, which devise can only in its terms confer life estates ; and the subsequent direction to the trustees to convey is a separate and distinct clause, and moreover only directs to convey to these children accordingly, *i.e.*, according to the above previous devise of life estates only.

Again, the construction of this codicil is strongly confirmed by reference to the will of this testator, where a similar clause is used after devising various life estates, estates tail, and fee simples to the several persons named in his will. The testator says, " And I do hereby give and devise my said estates, lands, and tenements accordingly," showing that this form of expression, subsequently repeated in the present codicil, was merely intended to reiterate the previous gifts, and not to enlarge them, but rather to prevent them from being enlarged by any implication or construction.

It is also of great importance to observe that in this second codicil the testator has by express terms devised three separate estates of inheritance by proper and apt words—*viz.*, the house in Pitt-street to *Rosetta Terry*, " her heirs and assigns, for ever ;" the cottage in Castle-reagh-street to *Edward Terry*, " his heirs and assigns, for ever ;" and the houses in Pitt-street and Macquarie Fields to *Martha Foxlow Hosking*, " her heirs and assigns."

With such repeated devises of estates of inheritance in immediate contiguity with the devise to children, it would be very dangerous to disregard as immaterial the *absence* of words of inheritance in the latter devise.

For these reasons I am of opinion that, upon the true construction of this will and codicils, and according to the established rules and maxims, this Court would be straining *Moore v. Cleghorn* beyond all due limits if it should be applied to this testator's will and codicils ; consequently the specific devises to *Henry Marsh* lapsed to the heir-at-law, and the conveyance from him to *J.T. Hughes* on 17th March, 1838, ten years before the

 1866.

NORTON
and others
v.
HUGHES
and others.

1886.

NORTON
and others
v.HUGHES
and others.

decision in *Moore v. Cleghorn*, was a perfectly valid conveyance of Cobbity and Redmire, and that *Esther Hughes*, the defendant, is right in the allegation of her answer.

Again, with reference to the lapse of this reversion in fee into the residuary devise, instead of to the heir-at-law, it is well known that the cases cited as to the lapse of reversions in fee or other undisposed of interests, as vesting in the residuary devisees as against the heir-at-law, are all cases of express residuary devises of an inheritable estate, in fee simple ; *i.e.*, are all lapses of a smaller into a greater or equal estate ; but here the lapse is of a remainder in fee, and the residuary devise being for life, I cannot see how such estate for life can receive the reversions in fee, and consequently the heir-at-law's estate, on this ground, has the better title to such lapse.

Lastly, it seems to me that the words here used by the testator, excepting from the residue, all estates hereinbefore *specifically otherwise* disposed of, are very strong against including Cobbity and Redmire, being such as have never yet been decided to be of no avail in withdrawing such lapsed estates, and are obviously of great importance. See the case cited at p. 550, *Jarm.*, Vol. 1.

We now come to consider the third and very important question which arises upon this codicil, and these facts—*viz.*, are the trusts of this residuary devise, express or constructive trusts. For even if this Court should be of opinion that upon the death of *Marsh* without issue during testator's life, the above cases applied to this will and codicils, so as to vest the legal estate of Cobbity and Redmire in the trustees and not in the heir-at-law, still it must be remembered that such opinion of the Court would relate only to the devolution of title or vesting of estate in these properties as a mere question of conveying ; and this question must be kept by the Court perfectly clear from, and is in fact quite a separate and distinct question from the present liability of *Mrs. Hughes* or any other parties to restore to the trustees either these farms or properties, or any other properties which at testator's death possibly formed part of testator's residuary estate ;

all such liability to restore property of any kind depending on long established legal and equitable rules, maxims, and principles, which are totally distinct in their nature and application from the rules, maxims, and principles of conveyancing as to matters of title.

The importance of this distinction is apparent from the words of the 25th section of the Limitation Act, which applies only to cases where the *estate is vested* and upon an *express trust*.

Now the distinction between "express" and "constructive" trusts has been well established by many authorities—viz., first by the Lord Commissioner *Ashurst's* judgment in *Townshend v. Townshend* (a); secondly, by the very luminous judgment of Sir *W. Grant* in *Beckford v. Wade* (b); and lastly, by Lord *Plunkett's* judgment in *Salter v. Cavanagh* (c), and by concurrent decisions of the Equity Courts ever since those authorities.

In *Beckford v. Wade*, Sir *W. Grant* said, constructive trusts are "made out through the evidence in the cause by certain facts established;" and Lord *Plunkett's* expressions are to the same effect—an express trust is one necessarily "to be collected from the terms of the will itself—a constructive trust does not arise on the face of the instrument itself, but is to be made out by evidence."

This doctrine is also well illustrated by the well-known equitable distinctions between actual and constructive fraud, and express and constructive notice.

Again, by comparing the sections 16-18, with section 8 of 11 Geo. IV., and 1 W. IV., c. 60, as to express trusts as contrasted with constructive trusts, and considering Sir *C. C. Pepys's* observations in *Re Deardon* (d), we find the distinction recognised precisely as I have laid it down above.

With reference to these authorities, Mr. Justice *Story* says (e), "Express trusts are those which are created by the direct and positive acts of the parties by some writing or deed or will. Not that in those cases the

1866.
NORTON
and others
v.
HUGHES
and others.

(a) 1 Br. C. C. 50; 1 Cox. 28 (1783). (b) 17 Ves. 87 (1810).

(c) 1 Dr. & Wa. 668 (1838).

(d) 3 M. & K. 510-13 (18).

(e) Vol. 2, p. 329.

1866.

NORTON
and others
v.HUGHES
and others.

language of the instrument need point out the very nature, character, and limitations of the trusts in direct terms, *ipsissimis verbis* ; for it is sufficient that the intention to create it can be fairly collected *upon the face of the instrument from the terms used* ; and the trust can be drawn, as it were *ex visceribus verborum*. Implied trusts are those which are deducible from the nature of the transaction, as a matter of clear intention, *although not found in the words of the parties*, or which are superinduced upon the transaction by operation of law as matter of equity, *independent of the particular intention of the parties.*"

So also Mr. Spence's Eq. Jur. (a), defines constructive trusts to be "trusts which depend upon conclusions of law, independently of contract, &c., and often arise in cases where there was no intention to create a trust on the part of any of the parties concerned.

The plaintiff's bill also admits this well established rule by praying this Court to make a declaration that the hereditaments claimed specially by this bill, formed parts of the residuary estate of the testator ; a prayer which is not only unnecessary, but absurd, if Cobbity and Redmire *were expressly* given upon trust ; but this is the appropriate and proper prayer, when the power of the Court is invoked to construe the will and to declare trusts not being expressed but arising by operation of law.

Subsequently to the argument on this case two cases have been referred to by Mr. Gordon (of course also communicated to the defendants) upon which I must make one or two observations ; the cases are *Bullock v. Downes* (b), originally heard before the Master of the Rolls (c), and *Lister v. Pickford* (d).

In the former case, *Bullock v. Downes*, trustees had divided and paid the funds of a known and ascertained residue among several parties in exclusion of another party admitted by the defendants to be entitled to share in the funds ; the trust also had been admitted and had

(a) Vol. 1, p. 508-9. (b) 9 H. L. C. 1 (18). (c) 25 Beav. 61.
(d) 34 L. J. Ch. 582 ; 11 Jur. N. S. 649 (June 1865).

been acted upon in all its liabilities up to the filing of the bill. Neither the case nor the decision has any application whatever to the present case—except perhaps in the Lord Chancellor's observations of law, as to the reluctance of the Court to interfere with constructions, though erroneous, when long acquiesced in.

In *Lister v. Pickford*, the trustees entered upon the lands as trustees, and the decision would only apply to the present case if Mrs. *Hughes* had entered upon the lands in 1854, when she appears to have been induced to accept the trusteeship in the place of a deceased trustee, she having been in adverse possession and actual possession of all these three properties since 1844 or 1851, in her own right.

The authority is in fact strongly in favour of the defendant; for the Master of the Rolls says:—"As the testator died in 1842, and the bill was not filed till August 1868, the plaintiff, if time was running against him the whole of that time, was now clearly barred." That is, the sections of the Limitation Act, other than the 25th, would bar the plaintiff; which he could not have said if the general residuary devise was *per se* an *express* trust of the particular estate claimed in that case.

This case is also useful because there was no specific devise of the property claimed to be included in the residuary clause; and the plaintiff, therefore, asked for a *declaration* that this particular estate formed part of the residuary estate; which declaration would, as I have already shown, be unnecessary, and indeed absurd, if the plaintiff could have contended that the general residuary devise was *express* as to any particular estate.

This authority, therefore, plainly supports the defendant's construction of the statute and of this residuary clause.

But there is another very recent case, viz., *Rolfe v. Gregory* (a), before the Lord Chancellor *Westbury*, January 1865, which adopts the definition I have given of a constructive trust, that it is raised by operation or construction of law. The Vice-Chancellor had limited

1866.

NORTON
and others
v.
HUGHES
and others.

(a) 5 New Rep. 257-8.

1866.

NORTON
and others

v.

HUGHES
and others.

the relief given to the plaintiff by allowing the defendant the benefit of this statute, upon the ground that he was only a constructive trustee by receiving specific and express trust funds from the executor, who was named the trustee in the will; but the Lord Chancellor in reversing this decree admits the Vice-Chancellor's reasoning, but shows that the defendant, by receiving the trust fund *expressly* mentioned as such in the will *from the executor and trustee*, was on the facts cognisant of the fraudulent abstraction of the trust property, and had been guilty of a fraudulent receipt and appropriation of such fund by the defendant for his own benefit.

Relief in such cases, said Lord *Westbury*, is founded on the fraud, not on the constructive trust. Here it is not pretended that any fraudulent transfer has taken place, but relief is claimed simply on the ground of title and an express trust, and on nothing else whatever. In fact, so far from pretending any fraud on the part of Mrs. *Hughes* or those through whom she claims, the bill asks that she may be directed to admit the trustees of the will into the possession of those three properties as joint trustees with herself.

Applying all the above mentioned authorities and principles to the present case, as the testator *expressly* devises these estates of Cobbity and Redmire *beneficially* to *Henry Marsh*, it is impossible to contend successfully that quoad these particular estates, the same testamentary instrument can be held to contain an *express trust* of such two estates to the residuary devisees, merely because by the operation of rules of law, contrary to all the express words of the testator, and by proving *aliunde* the death of *Henry Marsh* without issue during the testator's lifetime, and by evidence in the cause, these two estates became, in fact, a part of the testator's residuary estates.

As I have already said, the fallacy of the plaintiff's argument in this respect seems to me to arise from confounding rules of title in conveyancing with rules of equity as to express and constructive trusts, which are two perfectly distinct and separate subjects, without any necessary connection whatever.

But it must also be borne in mind that if the residuary gift be held to confer inheritable estates by construction or implication of law, this renders the trust constructive or implied also; and, therefore, not express. See on this point *Bythewood*, Vol. 11, when considering the case of *Moore v. Cleghorn*.

1866.
NORTON
and others
v.
HUGHES
and others.

The preceding remarks apply of course chiefly to Cobbity and Redmire; but with regard to the 175 acres not specially mentioned in the testator's will, I am not prepared to hold that a general residuary devise upon trust of property altogether undescribed in the will, will create an "express trust" under the 25th section of the Limitation Act, either *quoad* those particular 175 acres or *quoad* any particular property which may be proved at any future time beyond twenty years from testator's death to have formed part of the testator's residuary estate at the time of his death. Such a doctrine would be fraught with the most dangerous consequences to all our real property titles—is altogether inconsistent with common sense and just equity—and is altogether unsupported by any authority that I am aware of. To hold such a rule would obviously be contrary to the very foundation of the reasons for protecting express trusts from the Statute of Limitation; which is, that, *by being expressed* on the face of the instrument, all parties have notice expressly of such trust, and are not liable to be misled by the uncertainties of evidence—*dehors* the instrument.

To put this point very simply: Can it be argued that a general devise of undescribed estates upon trust, gives express notice to all parties of these trusts, just as if such estates were expressly scheduled in the will, as these plaintiffs are obliged to schedule them to their bill? It seems to me too absurd to contend further against such a construction.

It must also be remembered that the parties beneficially interested in all general residuary trusts are amply protected by the well known equitable rules as to requiring trustees to ascertain such residuary trusts within reasonable time; and if the *cestui que trusts* permit the twenty

1866.

NORTON
and others
v.
HUGHES
and others.

years allowed by the Statute of Limitations to expire without requiring any such properties to be sued for or otherwise recognised as between trustees and *cestui que trusts* as part of the trust, I am not disposed indirectly to extend the liability of trustees in such respects beyond the present limits of equity, which I certainly should do if this bill were allowed.

To put this point generally: Can it be contended that all estates are to be declared as held upon "express trusts," merely because it may be discovered above twenty years after a testator's death that according to certain events, facts, and evidence, or upon the true construction of certain deeds and writings of conveyancing, and by operation of certain rules of law, or by any other devolutions of title, whether by lapse from a testator's will and codicils, as in Cobbity and Redmire, or in any other way by construction of such will and codicils, such estates might have been lawfully claimed at the testator's death, or within twenty years from testator's death, as part of his undescribed residuary estate upon the trusts thereof?

The only remaining point under the Statute is as to the existence of any disability which might have been alleged as to any of the plaintiffs; but the only paragraph of the bill on this point is the 7th, viz., "That, previous to the year 1839, the parties beneficially interested under the said will and codicils were infants under the age of twenty-one years." It seems to me impossible to understand this allegation as setting up any definite disability, either in the plaintiffs or any other persons beneficially interested in the said lands within the period of twenty years before filing the original bill in 1862.

With regard to the 175 acres, the defendant appears to have been simply in possession of such lands adjoining Cobbity and Redmire. The answer schedules no deeds as to this property; and there is not the slightest evidence, by deeds or otherwise, that I am aware of, as to the title of the defendant, or, indeed, of the plaintiffs, except that these 175 acres were probably occupied by the testator

under some contract with the original grantee, all evidences of which are now lost. Mrs. *Hughes* title, therefore, is, on the evidence, simply a title of adverse possession.

Lastly, with reference to the equitable doctrines of laches and of acquiescence, which it is well known are altogether independent of the Statutes of Limitation, and are often applied even to cases of express trusts—it is observable here :—

First, that from the year 1838 till the year 1862, no claim to any of these three properties was made, although Cobbity and Redmire were expressly mentioned in the will, and therefore the attention of the trustees, and of the nine children, thus expressly directed to these properties, as having belonged to the testator.

Secondly, there is only one of these nine children who now, after twenty-six years, can be induced to become a plaintiff to the present suit,—the other two surviving children, who have not parted with their shares, having declined to join in this suit, and are therefore made defendants.

Thirdly, the other plaintiffs are—1. *T. W. Smart*, who became a purchaser in 1851, of one-ninth of the said residuary estate from *John Stirling*, who had been the purchaser in 1843, of the ninth originally vested in *Martha Theresa Hughes*, a daughter of *J. T. Hughes*. 2. The plaintiff, *W. W. Billyard*, who became a purchaser in 1857 of two-ninths of the said residuary estate, from the two other children of *John Terry*; being also a purchaser of a third ninth in 1859, from a son of *J. T. Hughes*; and again in 1862, a further purchaser of a fourth ninth of the said residuary estate from the trustees for another daughter of *J. T. Hughes*; and 3, the four other plaintiffs, Messrs. *Osborne*, being entitled as representatives of their late father to the ninth of the said residuary estate, which he had purchased in 1858, from *Priscilla Hughes*, the other daughter of *J. T. Hughes*.

Fourthly, it is impossible not to observe the very unusual circumstance of Mrs. *Hughes* having been appointed a trustee of this residuary estate in 1854, when

1866.

NORTON
and others
v.
HUGHES
and others.

1866.

NORTON
and others
v.
HUGHES
and others.

she and her husband had been openly in possession of these three properties ever since 1838, under the conveyance to *J. T. Hughes* by the heir-at-law. I am far from looking upon this appointment as making her subsequent possession as ceasing to be "adverse." It seems to me to be, under all the circumstances of the case, one of the most convincing proofs of acquiescence in her title and conduct that could possibly have been suggested. At the same time I cannot help feeling some degree of curiosity as to what legal advice she received before she was induced in 1854 to accept such a very unusual appointment for a female, which has now been contended to have indirectly so materially affected her position.

It is impossible for me now to cite and explain all the authorities and equitable doctrines applicable to all these circumstances which I have thus mentioned as bearing upon the conduct and position of the parties;—but I may state generally, that I do not believe that a Court of Equity could ever apply the doctrines of acquiescence and laches with greater propriety or with less hesitation than in the present case. I do not believe that the Equity reports contain any case in which the acquiescence as well as the laches have been so widely extended, among so many parties, during so long or so continuous a period, or so totally unaccounted for by any excuse or any special circumstances; nor where the possession of the defendant has been so open, avowed, and unquestioned.

Nor can I altogether omit at least to mention, that, if this Court were now to set aside the deed of March 1838 as void, it is now quite impossible to restore to the defendant her right as against the testator's estate for the cattle then relinquished to that estate as a consideration for that conveyance.

Upon this point Lord *Brougham's* remarks in *Clifton v. Cockburn* (a), and Lord *Campbell's* in *Downes v. Bullock* (b), seem strongly confirmatory of the defendant's right to protection against the present bill.

(a) 3 M. & K. 100.

(b) 9 H. L. C. 1.

For the reasons I have thus explained, I think that this bill ought to be dismissed with costs.

1866.

NORTON
and others
v.
HUGHES
and others.

FAUCETT, J. The facts of the case have been so often and so fully stated, that I deem it unnecessary to refer to them with any degree of particularity. I shall, therefore, confine my observations chiefly to the questions of law that have arisen.

Mrs. *Hughes*, the principal defendant in this suit, is a trustee under the will of *Samuel Terry*, having been so appointed in the year 1854. She is also—and had been for some time previously to 1854—in actual possession of the lands in question in the suit—viz., the farms of Cobbity and Redmire, and the 175 acres adjoining. And the first question that arises is, whether, being such trustee, and being in such actual possession, she is a trustee, under that will, of those particular lands; and if so, whether she holds them as such trustee under an *express trust*, i.e., a trust expressed in the will; in other words, whether these lands are vested in her upon an express trust, so as to bring her within the terms of the 25th section of the Statute of Limitations, 3 and 4 W. IV., c. 27, and so prevent the claims of the *cestuis que trusts* under that will, against her as trustee, from being barred by lapse of time.

In order to determine this question, it is necessary, in the first place, to ascertain in whom, according to the will and the codicils thereto, the lands vested upon the death of the testator. And for this purpose we must consider the terms of those instruments.

I shall for the present confine myself to the lands of Cobbity and Redmire, which are expressly mentioned in the will. The 175 acres, not being specifically mentioned, stand on a somewhat different footing.

Now, under the will of 1824 there was a devise of the lands of Cobbity and Redmire to *Henry Marsh* in tail. It will be observed that the reversion in fee of these lands is nowhere in the will specifically, or expressly, i.e., by name, disposed of. That reversion, therefore, if it were not for the subsequent devise to *Edward Terry*,

1866.
 NORTON
 and others
 v.
 HUGHES
 and others.

would be in the testator and his heirs. But, by that subsequent devise, the testator gives certain estates and lands mentioned by name, and "all and singular other his messuages, farms, lands, and hereditaments of every description, *not thereinbefore disposed of by him*, and wheresoever lying and being, and whether in possession, remainder, or expectancy," to *Edward Terry* in tail.

Now, as the reversion in fee, expectant upon the estate tail to *Henry Marsh*, of Cobbity and Redmire, had not been before disposed of, it is clear that, by this species of residuary devise, *Edward Terry* was entitled to an estate tail in those lands, to be taken or carved out of this reversion—the ultimate reversion being still left in the testator and his heirs.

So the matter stood according to the will of 1824.

But by the codicil of 1834 the testator revokes this devise to *Edward Terry*; and particularly—in express words—revokes the residuary devise in tail to him, and devises by name the same lands, which by the will of 1824 he had given to *Edward Terry*, "and all other his real estates not otherwise disposed of by his said will or by this codicil," to trustees in fee.

Now, as by the will of 1824, *Edward Terry* had an estate tail carved out of the reversion in fee, expectant upon the estate tail of *Henry Marsh*, so, by this codicil of 1834, the whole of that reversion in fee being devised to the trustees, they, by such devise, acquire a remainder in fee, expectant upon the same estate tail of *Henry Marsh*, that is, a remainder in fee in Cobbity and Redmire. It is precisely the same as if the devise were—of Cobbity and Redmire—to *Henry Marsh* in tail, remainder in fee to the trustees.

Next, what is the effect of the death of *Henry Marsh* in the testator's life time?

It is simply this: the remainder in fee to the trustees is accelerated, and takes effect as an immediate devise in fee (*a*); and accordingly, upon the testator's death, the trustees take at once, or are entitled

(*a*) 11 Jarm. Conv. Wills 210, and 1 Jarm. on Wills 483-4, and the cases cited.

to an estate in fee in possession in those lands of Cobbity and Redmire—in other words, those lands are vested in the trustees in fee. And that they are so vested, in my opinion, clearly appears from the express terms of the will and codicil, without having recourse to any extrinsic evidence, except, no doubt, the evidence of *Henry Marsh's* death; which evidence, however, is only necessary for the purpose of showing when the remainder in fee was to take effect. For, whether *Henry Marsh* died after the testator, without issue, or before the testator, the remainder in fee is equally given in express terms to the trustees; the only difference being that in the one case the estate of the trustees comes into possession at a later, in the other at an earlier period.

So far for the legal estate. And now, on what trusts were these lands so vested in the trustees? Clearly on the trusts expressed in the codicil of 1834, as modified by the codicil of 1836, viz., that the trustees should allow *Edward Terry* to enter upon all the lands devised to them, including under the residue the lands in question—and take the rents and profits for life, and that after his death they should convey to his “heirs,” as they respectively attained the age of twenty-one years, and in case he should die without leaving issue—an event which has happened—then, by the codicil of 1836, that they should convey to the children, who should be then living, of *John Terry*, *John Terry Hughes*, and *Martha Foxlow Hosking* as tenants in common. These are the trusts expressly set forth on the face of the codicil. It has been, however, suggested, during our deliberations on this case—although the point was scarcely, if at all, mentioned in argument, and certainly not pressed—that the trusts in this case are constructive trusts, and not express trusts; because, it is said, the death of *Henry Marsh* must be proved by extrinsic evidence, and upon his death before the testator, his estate lapsing, the estate in the trustees would arise by operation of law.

Even if this were so, it would only come to this, that the *estate would vest* in the trustees by construction or operation of law. But by what combination of facts or

1836.

NORTON
and others
v.
HUGHES
and others.

1866.

NORTON
and others
v.
HUGHES
and others.

circumstances proved by extrinsic evidence or otherwise, the trusts declared by the will could be implied, or construed by law to arise, it is impossible to conceive.

Now the question whether or not trusts are constructive depends, not on the nature or character of the trusts, but on the circumstances under which, or the manner in which, the estate to which they are sought to be attached has been acquired, or has come into possession.

Admitting this, and admitting also that, to bring a case within the 25th section of the statute, the lands must be vested by the instrument, as well as the trusts declared by it, I have shown—if I am correct in the view I have taken—that a remainder in fee is expressly given to the trustees—evidence of *Henry Marsh's* death only showing when that estate is to take effect—and that the objects of the trust are also expressly declared.

We have thus apparent on the face of the instruments everything that is necessary to constitute an express trust—the trustees named, the subject clearly indicated, and the objects of the trusts specifically and expressly declared.

Some doubt has been raised in the same manner as to whether the “children” of *John Terry*, *John Terry Hughes*, and *Martha Foxlow Hosking* were entitled to an estate in fee, or only an estate for life. But I think it is clear, from the words of the codicil, that the testator intended that, after certain devises, those children should take the whole of the residue of the reversion which had been in himself, *i.e.*, an estate in fee; and it has been decided that where lands are devised by will dated before the late Wills Act, to trustees in fee for a person without any limitation, the *cestui que trust*—where at all events such intention is clear—would take an equitable estate co-extensive with the legal estate devised to the trustees. Of course, if the contrary intention be clear, the rule will not apply. See *Moore v. Cleghorn* (a), following *Challenger v. Sheppard* (b), and *Knight v. Selby* (c). The intention therefore being clear and the

(a) 12 Jur. 591.

(b) 3 T. R. 597.

(c) 3 M. & G. 92.

words sufficient, I am of opinion that the *cestuis que trusts* in this case are entitled to an estate in fee.

I have gone through this part of the case with perhaps unnecessary fulness ; but I have done so chiefly in consequence of doubts that were suggested during our conferences.

Having thus shown the position of the trustees and the *cestuis que trusts* under the will and codicils, let us see what next takes place.

Upon the testator's death, in 1838, *Edward Terry* enters and takes possession, amongst other lands, of the lands of Cobbity and Redmire. He was clearly entitled only to an estate for life, or, at the utmost, to an estate tail. But by a mistake, in which all parties appear to have shared, he was supposed to have had the fee. This mistake, I may say in passing, in all probability arose from the fact being overlooked, or its effect not considered, that the devise to *Henry Marsh* was only of an estate tail ; for, if it had been of an estate in fee, and the whole interest of the testator in these lands had so been disposed of, the devise having lapsed, the estate so lapsing would have passed to *Edward Terry* as heir-at-law.

Edward Terry then, being in possession, by indenture of March 1838, purports, along with *Rosetta Terry*, one of the trustees named in the will, and *John Terry*, who had no interest whatever in the lands, but who appears to have joined as executor of the testator, to convey, for the considerations mentioned, the lands of Cobbity and Redmire to *John Terry Hughes*, another of the trustees named in the will, in fee. And under this conveyance *John Terry Hughes* at once entered. If this conveyance had been to a stranger, instead of to one of the trustees, it is quite clear that twenty years' possession under it would have been a bar not only against the trustees, but also against the *cestuis que trusts*. And it is now contended that, as this conveyance was made honestly and under a belief on all sides that *Edward Terry* had a right to convey in fee, and as *John Terry Hughes* entered under it and professed all along to hold under it

1866.

NORTON
and others
v.
HUGHES
and others.

1866.

NORTON
and others
v.
HUGHES
and others.

for his own benefit, therefore the possession and enjoyment of the latter must be treated as adverse to the rights of his *cestuis que trusts*—in other words, that this tortious conveyance must place him—a trustee upon express trusts—in the same position, in respect to the Statute of Limitations, as if he were a stranger. Now, if this were so, I confess I cannot understand why the 25th section should have been passed, which makes time immaterial in such a case until the trust is disturbed—a disturbance which can only be effected by such a denial of the trust as takes place when the trustee sells to a third party (a); not surely when the trustee takes a conveyance to himself and enters into possession of the trust property, intending to do so, however honestly, for his own benefit.

Besides, admitting that the conveyance inured to the benefit of *John Terry Hughes* during the life of *Edward Terry*, still I am of opinion, both upon the authorities and upon principle, that, when he retained and continued in possession after the death of *Edward Terry*, that continued possession, no matter how originally obtained, must be treated as his possession as trustee. Whether or not he knew that he was a trustee, or intended to hold, or believed honestly and *bona fide* that he did hold, in his own right and for his own benefit, seems perfectly immaterial. It is sufficient, if being a trustee he got—no matter how—and held possession, his possession in such case must be taken to be, and treated as, his possession as trustee, and for the benefit of his *cestuis que trusts*. He had accepted and was clothed with the trusts; and as trustee he was, upon the death of *Edward Terry*, if not in possession, not only entitled but bound to enter into possession. If a stranger had been then in possession, it was his duty to eject him; and being himself in possession, it was equally his duty to hold for his *cestuis que trusts*. No possession of a trustee can be adverse to his *cestuis que trusts*. If it were otherwise, who could assert or protect their rights? No one else could bring ejectment. If a trustee were allowed to set up as an answer to the claim of his *cestuis que trusts* that he had

(a) Sugd. R. P. Stat. 103 (1st ed.)

obtained the trust estates for his own benefit, honestly and for good consideration, and in absolute ignorance of the rights of his *cestuis que trusts*, it is manifest that a door would be opened wide for fraud. At all events, the result of all the authorities that I have examined appears to me to be, that this cannot be done.

1866.
NORTON
and others
v.
HUGHES
and others.

The possession, then, of *John Terry Hughes* must, in my opinion, be considered the possession or as for the benefit of his *cestuis que trusts*; and this possession continued until his death in October 1853. And up to this period, in my opinion, the Statute of Limitations had not begun to run; and accordingly, in this view of the case, this suit has been commenced in time, without any reference to the circumstance of Mrs. *Hughes* being a trustee.

But further, Mrs. *Hughes*, the defendant, having on the death of her husband taken possession of the lands in question, no doubt under the belief that he had held them in his own right, is, in 1854, appointed a trustee under the will. Now the same principles, in my opinion, apply to her. Having accepted the trusts, these lands were, by such acceptance, and by virtue of the will, vested in her; and as trustee she was not only entitled, but bound to take possession; and being in possession, her possession must be taken to be for the benefit of the *cestuis que trusts*.

But it is said that Mrs. *Hughes*, in 1854, became a trustee only for the general purposes of the will, and not in reference to any trusts affecting the lands in question. But surely this cannot be so. Having accepted the trusts of the will, she was bound to see that all the trusts were carried out. She was not at liberty to say, "I shall perform a part of the trusts and repudiate a part; I shall hold some of the trust estates for the benefit of the *cestuis que trusts*, and others for my own benefit."

The case of *Lister v. Pickford* (a)—to which the attention of the Court has been drawn since the argument—is, in several respects, like the present case. There a mistake, under which all parties laboured, commenced

(a) 34 L. J. Ch. 565; 11 Jur. N. S. 649.

1866.

NORTON
and others

v.

HUGHES
and others.

in 1842 upon the testator's death, and continued up to 1863, *i.e.*, for more than twenty years. During all that time the land in dispute was supposed to be part of a specific devise made by the will. From 1842 to 1850 it was held by the tenant for life under the will as part of such specific devise; and from that time to 1863 the trustees received the rents and applied them as if the land were part of such specific devise; yet the land was held to be in reality part of the residuary estate, and as such vested in the trustees; and their possession, although acquired and held under a supposed different trust, was held to be for the benefit of the real *cestuis que trusts*. Some of the observations of the Master of the Rolls appear to be applicable to this case. He says:—"But it is contended on the part of the defendants that the trustees were really in possession as trustees for Miss *Lister*, and that therefore their possession must be treated to have been adverse to that of the plaintiff. I am of opinion that this argument cannot be maintained. A trustee who is in possession of land is so on behalf of his *cestui que trust*, and his making a mistake as to the person who really is his *cestui que trust* cannot affect the question. Messrs. *Pickford* and *Jackson* thought that the infant was the real owner, and that they held the property for her; but, in truth, in that character they had no right to possession at all. Suppose they had imagined, *bona fide*, that they themselves were entitled personally to the beneficial interest in the property, and that they were not trustees of it for any one, it would, nevertheless, have been certain that they would have been trustees for the *cestui que trust*, and no time would have run against their *cestui que trust*, while they were in such possession. The legal estate was vested in them. No other person could have maintained an action of ejectment against them. *They were bound to know what the law was*, and they ought to have taken possession as soon as they knew who were the real beneficial owners of the property, and when they obtained possession they ought to have applied a proper proportion of the rents for the benefit of the residuary devisee." And

again, " In whatever manner they obtained possession, as soon as they did so their possession must be attributed to their real right to possession, and not to any other right; were it otherwise, it would be possible for trustees to give the property of one *cestui que trust* to another, at their pleasure."

1866.
NORTON
and others
v.
HUGHES
and others.

Applying to the present case the principles so distinctly stated, I am of opinion that these lands are vested in Mrs. *Hughes* upon an express trust, within the meaning of the 25th section of 3 and 4 W. IV., c. 27, and that, therefore, the *cestuis que trusts* would not be barred as regards her by a lapse of twenty years from prosecuting this claim.

I have said that the 175 acres stood on a somewhat different footing from Cobbity and Redmire. But in reality the only difference is, that the 175 acres must be shown by evidence to be part of the residue devised to the trustees, while the death of *Edward Terry* must be proved to show when the remainder in fee of Cobbity and Redmire vested in them.

It is said, however, that the indenture of March 1838 was the result of a family arrangement, which has been acquiesced in for a great number of years, and ought, therefore, to be upheld. To this the answer is, in the first place, that by the settlement one trustee purported to convey away lands which she had no right to convey away, to the prejudice of her *cestuis que trusts*, while another trustee, equally to the prejudice of the same *cestuis que trusts*, obtained the lands. That settlement, moreover, was entirely for the benefit of *Edward Terry* on one side, as the personal representative of *Samuel Terry*, and of *John Terry Hughes*, in right of his wife, Mrs. *Hughes*, as the representative of *Henry Marsh*, on the other side. But what benefit did the *cestuis que trusts* derive from it? I can see none. In the next place, there can be no acquiescence without not only a knowledge of the facts, but also a knowledge of the rights arising from the facts. In *Marker v. Marker (a)*, the Vice-Chancellor says :—" Parties cannot, I think, be

1886.

NORTON
and others
v.
HUGHES
and others.

said to acquiesce in the claims of others, unless they are fully cognisant of their right to dispute them." And in *Bowes v. The East London Waterworks* (a) it was contended that the plaintiff, having received rent for nine years under the leases which he was impeaching, was precluded from equitable relief. But the Vice-Chancellor held otherwise, saying, "It is plain that the plaintiff, during the receipt of the rent, was wholly unaware of the imperfection of the leases." And in *Downes v. Bullock* (b) it is held that there is no acquiescence where all have laboured under a common mistake, in ignorance of their rights, which must mean in ignorance of the law; and the reason appears to be this, that acquiescence implies intention, and there can be no intention unless there is a knowledge of one's rights—that is, a knowledge of the facts and of the law arising from those facts. And in the present case it is clear that all parties were ignorant of their rights.

I am, therefore, of opinion, that there has been no acquiescence on the part of the plaintiffs, who are *cestuis que trusts*, which ought to deprive them of the benefits of the 25th section of the statute. Neither do I think that laches have been shown to such an extent since the discovery of their rights as to deprive them of that benefit.

Before concluding, I think it right to allude to the case of *Malone v. O'Connor* (c), which has been relied on, on the part of the defendants, chiefly on account of some expressions used in the judgment. But those expressions, when considered in connection with the circumstances of that case, will not, I think, be found to be inconsistent with the conclusion at which I have arrived. There the defendants were in no way connected with the testator, and could in no sense be treated as trustees, but certainly not as trustees under an express trust. Their possession was not according to the title of trustees under the will, but adverse to and in conflict with such a title. Here, on the contrary, the will under which *John Terry Hughes* was appointed a trustee, and of which he had accepted the trusts, showed at the same time the title of

(a) 3 Mad. 375. (b) 25 Beav. 54. (c) 9 Ir. Ch. R. 459.

the *cestuis que trusts*, and that he was a trustee of those very lands, of which he was in possession. His possession, therefore, was according to his title as trustee, and not in conflict with it. And so likewise with respect to Mrs. *Hughes*. And in the very same judgment it is said, "If the trustee be in possession and does not execute his trust, his possession operates nothing as a bar, because it is according to the title, that is according to the manifest right of the *cestui que trust*, against whose right, therefore, such possession cannot be set up;" *Hovenden v. Annerley* (a). And again, "the proceeding there is rather taken to enforce the execution of the trust, than as a proceeding directly for the recovery of the land."

On the whole, therefore, I am of opinion that the *cestuis que trusts*, who are plaintiffs in this suit, are entitled to the lands mentioned to the extent of the interest given them by the will of *Samuel Terry*; and, also, to the account prayed for. In *Lister v. Pickford*, before referred to, an account was granted from the death of the tenant for life, that is, from the time the trustees first received the rents, &c.—a period of thirteen years. But, under all the circumstances of this case, I concur in the opinion that the account may be properly limited to six years from the filing of the amended bill.

1866.

NORTON
and others
v.
HUGHES
and others.

(a) 2 Sch. & L. 633.

1866.

May 22, 23, 30.

BURNS *against* LONG and another.

The purchaser of an equity of redemption, having notice of any lease or occupation of the mortgaged premises, is bound by the equities existing between the mortgagor and the tenants or occupiers; and if the mortgagee himself purchase the equity of redemption, without the intervention of a trustee, he cannot set up his mortgage against such equities, but takes the estate precisely as any other purchaser.

E. having, in 1863, mortgaged certain land to L., with proviso for redemption in 1868, granted a lease, in 1864, of part of the property to B. for thirty years. In 1865 L. purchased the equity of redemption, and at the same time, gave a lease of the whole property to S. for three years, both L. and S. having at the time notice of B's lease.

Held, that the lease to S. was subject to B's lease, and that B. was entitled to an injunction restraining S. from prosecuting an action of ejectment against him, and to have his lease confirmed by L. and S.

THE plaintiff in this suit, *Robert Burns*, filed his bill against the defendants, *William Long* and *Thomas Smith*, praying an injunction to restrain the defendant *Smith*, from prosecuting an action of ejectment to recover certain premises occupied by the plaintiff under a lease, and also praying that the defendant *Long* might be ordered to execute, and the defendant *Smith* to join in executing a proper lease to the plaintiff of the said premises, for the term, and subject to the provisions of the existing lease, and to do all acts necessary for establishing its validity.

The circumstances of the case, as stated in the bill, were as follows:—

By an indenture of mortgage dated 23rd June, 1863, one *George Elliott* conveyed to the defendant *Long* two acres of land in the town of Penrith to secure the repayment of £650, the proviso for redemption extending to 23rd June, 1868.

On 7th January, 1864, *Elliott* executed a lease of part of this property to the plaintiff for the term of thirty years from the 5th of November, 1863, at the rent of £12 per annum. The defendant *Long*, was not a party to that lease, but it was duly registered on the 9th of March, 1864.

The plaintiff had built on the land so demised to him two cottages, which produced a profit rent of £40 over and above the rent of £12.

On 6th February, 1865, *Elliott* conveyed to the defendant *Long*, in consideration of £10, the equity of redemption in the premises mortgaged to him, and on the same day, *Long* executed a lease of the said premises

to the defendant *Smith*, for three years, at the rent of £75 per annum.

1866.
BURNS
V.
LONG
and another.

In June, 1865, the defendant *Smith* brought an action of ejectment against the plaintiff, for the recovery of a portion of the premises leased to him by *Elliott*, with the cottage erected thereon; and the plaintiff, in July following, filed the present bill, seeking the equitable interference of the Court, to restrain the prosecution of the action, and protect his possession under the lease—charging that the defendant *Long*, at the time of the sale of the equity of redemption to him, had express notice of the lease by *Elliott* to the plaintiff, and that the defendant *Smith* also had such notice at the time of the execution of the lease to him by *Long*, and was informed that his lease was to be subject to that of the plaintiff, and that the plaintiff, or his tenants, were to pay him the rent of £12 per annum.

The defendant *Long* denied, by his answer, that at the time of his purchasing the equity of redemption, he had any notice of the claims set forth in the plaintiff's bill, or recognised them in any manner, and further denied, that at the time of his granting the lease to the defendant *Smith*, there was any understanding that the same was to be subject to the lease to the plaintiff from *Elliott*.

The defendant *Smith* also denied, by his answer, that he had any notice of the plaintiff's lease at the time of the execution of his own, and submitted that the plaintiff was not entitled to the equitable interference of the Court, because he had obtained his lease from *Elliott*, the mortgagor, after the legal estate in the premises had passed to the defendant *Long*, who had done no act in confirmation of the plaintiff's lease, and that he himself was a purchaser for valuable consideration, without notice of any equity existing between the plaintiff and the defendant *Long*, and that he had the legal estate in the premises, and on these grounds ought not to be restrained from prosecuting his action of ejectment.

1866.

BURNS
v.
LONG
and another.

The point to which the evidence taken in the case was chiefly directed, was whether the defendants had notice of the plaintiff's lease at the time of the transactions of the 6th February, 1865. The principal depositions are set forth *in extenso* in his Honor's judgment.

May 22, 23.

The cause now coming on for hearing, the following authorities and cases were cited by

Blake for plaintiff. *Jones v. Smith* (a), *Smith v. Phillips* (b), *Taylor v. Stibbert* (c), *Hiern v. Mill* (d), *Daniels v. Davidson* (e), *Allen v. Anthony* (f), *Bayley v. Richardson* (g), *Sugden's V. and P.* (h), *Taylor v. Baker* (i).

The Attorney-General and *Gordon* for defendant *Long*. *Barnhart v. Greenshiels* (k).

Owen for defendant *Smith*. *Spence's Eq. Jur.* (l), *Sugden's V. and P.* (m).

Blake in reply. *Dart's V. and P.* (n), *Furness v. Cherry* (o).

May 30.

The PRIMARY JUDGE now delivered judgment as follows :—

After stating the facts and allegations set forth in the pleadings, his Honor continued :—The main question is as to the transaction in February, 1865, and as to defendants having had notice of the plaintiff's lease. Upon this point *Maguire* deposes :—"I remember accompanying the plaintiff to the office of defendant *Long*. It was in June, 1865, after the defendant *Smith* had commenced the action for ejectment. I saw Mr. *Long*, and Mr. *Butcher*, his clerk. I asked Mr. *Long* if he would let me look at a lease he had made to defendant *Smith*. He first referred to Mr. *Butcher*, and

(a) 1 Hare 43, 65; 1 Phil. 244.

(c) 2 Ves. Jr. 437.

(e) 16 Ves. 249.

(g) 9 Hare 733.

(i) 5 Price, 306.

(l) 2 vol., p. 646 and 757.

(n) p. 590.

(b) 1 Keene 694.

(d) 13 Ves. 121.

(f) 1 Mer. 282.

(h) p. 748, 776.

(k) 9 Moore, P. C. 18.

(m) p. 588, 620, 13th ed.

(o) 2 Vern. 384.

said that they had not the lease there. In conversing about the terms of the lease, Mr. *Long* stated that he had informed Mr. *Smith* that there was a lease already made to the plaintiff, and that he should merely take the ground rent. He said he informed *Smith* before the lease was executed. I turned to Mr. *Butcher*, and asked who prepared the lease. Mr. *Butcher* said it was copied by a clerk in the office. I said, 'Was this lease reserved, and the ground rent mentioned?' He said, 'No, it was omitted through inadvertence, but that Mr. *Smith* understood he was only to receive the ground rent.' Mr. *Long* appointed the next day to produce the lease. The ground rent was mentioned to be £12 per annum. Mr. *Long* was then speaking of what he had told to Mr. *Smith*. I do not remember anything further. I saw Mr. *Long* afterwards, to see the lease, but I did not see it; and what then passed was a repetition of the former conversation, and he repeated that he had told *Smith* about the lease."

To the same effect is the evidence of the plaintiff:—
 "I saw the defendant, Mr. *Long*, after the action was commenced, at his office in George-street. My conversation was directed to Mr. *Long*. I told him I called in respect of some property which I understood he had bought of *Elliott* of Penrith; I asked if *Elliott* had deceived him about a lease of portion of the property, and he said he had not, and that he knew all about it. I said, 'Well, *Smith* has brought an action against my tenant, and wants to take the absolute rent instead of the ground rent.' Mr. *Long* said, '*Smith* must not have more than he is entitled to, and he knew very well what that was.' I asked him to let me see the original lease under which *Smith* held from him, and he promised he would. That is the first interview. At the end of June last. I went again the next day, and I saw the lease of *Long* to *Smith* at the desk in Mr. *Long*'s office. After that, I went with Mr. *Maguire*, and I saw Mr. *Long* and Mr. *Butcher*. Mr. *Maguire* asked Mr. *Long* if he knew of the existence of the lease of *Elliott* to *Burns*. Mr. *Long* said he knew there was

1866.

 BURNS
 v.
 LONG
 and another.

1866.

 BURNS
 v.
 LONG
 and another.

a long lease, but he could not say that he knew it was thirty years ; it might be twelve or it might be twenty. Mr. *Maguire* asked if he knew the ground rent was £12, and he answered, 'Yes,' and I believe he said *Smith* knew all about it. I do not recollect any question being put to Mr. *Butcher* at that time. I recollect Mr. *Butcher* making a statement in relation to the lease. He said the lease was prepared in the office, and not by a solicitor ; that he himself had told *Smith* that he was only to get £12 a year ground rent. I, *Maguire*, *Long*, and *Butcher* were together in the office at that time. I recollect *Butcher* saying something about the lease (to *Smith*) at the interview, and in *Long's* presence. He said that how I came into this trouble was that they had forgotten the lease to me, and had lost sight of me, and thought that the tenants in occupation had the lease, and told the tenants to pay rent to *Smith*, believing the rent to be £12. I asked could he charge his memory so as to swear to it, and he said he could, and that he had no object but to speak the truth."

With regard to the defendant's evidence, it does not seem to me that either the defendants themselves, or their witness Mr. *Butcher*, in any material respect contradict the plaintiff's evidence, but rather confirm it. The defendant *Smith*, although he denies "that he had any knowledge, at the time of executing that lease, that the plaintiff had a lease over the same premises," yet admits that he received by post the three letters from *Butcher* as agent for *Long*, one dated 10th February, and the two others dated 16th February (also enclosed notices to the tenants to pay their rent to defendant *Smith*), stating "that he would inform *Smith* of the particulars of the lease of the two cottages as soon as Mr. *Elliott* produced the lease," but that *in the meantime* the rent under such lease was due on the 5th May and 5th November, and was to be received by him (*Smith*). It also appears that "when *Smith* accepted his lease, on 6th February, 1865, the premises were occupied by two men—one was *Brown* and the other *Greenash* ; that. he himself was a publican, and had

lived for some years on the opposite side of the street; that he did not make any inquiry about the occupation by *Brown* or *Greenash*," but he will not swear that "Mr. *Long* or his agent did not tell him they were paying the sum of £12 a year." He also admits that "Mr. *Butcher* said these cottages were leased, and he was to have the rent," and he thinks this was in a letter.

Mr. *Butcher's* testimony is to the same effect; for, although he states "that on 6th February, 1865," and when he wrote the three exhibits of 10th and 16th February, "he had no knowledge of the plaintiff having a lease of the cottages," yet he admits "that he understood that *Burns* was one of the tenants of the two cottages, and he told me he had a lease, and I said, 'We have forgotten that altogether.' I know the name of the tenant of the other cottage was *Greenash*; that I knew in February, 1865, and at that time I was not aware of the name of the other tenant; I took the plaintiff *Burns* to be the other tenant. I knew that £12 a year was paid to *Elliott* for the cottages."

The defendant *Long's* evidence as to the same points is as follows:—"I cannot say when I first learnt that *Burns* had any lease; it was before the lease to *Smith* in February, 1865. I cannot say how long I left those matters to Mr. *Butcher* to manage. It was about the time of the mortgage that I heard of it. Mr. *Elliott* told me that he had about £12 a year coming in from the tenants of the two cottages. That was all I knew about *Burns*. I did not know *Burns* personally. I did not know the names of the tenants of the cottages. I did not know what interest *Burns* took under the lease referred to. I did not know the amount *Burns* was to pay. I did not know whether *Burns* was tenant of one, or of the two cottages. I heard it was £12 a year, but not the names of the tenants. Mr. *Elliott* did not tell me who had the lease, or that *Burns* had a lease; only that there was £12 a year coming in. He did not mention any names at all. I remember Mr. *Maguire* coming to my office, but I do not remember anybody being with him. On the second occasion I referred

1866.
BURNS
v.
LONG
and another.

1866.
 BURNS
 v.
 LONG
 and another.

Mr. *Maguire* to Mr. *Butcher*. I never said anything about a long lease or about ground rent. I never heard the ground rent mentioned until it was mentioned in Court during examinations. I delegated authority to Mr. *Butcher* to act in the whole of this business for me. I gave him all the information I knew about the cottages.

Cross-examined by Mr. *Blake*:—"I had this conversation about the £12 a year with *Elliott* before the conveyance of February, 1865. I saw *Smith* about his lease. I told him of £12 coming in from the two cottages which would go towards his paying the rent of £75 a year to me. I did not tell him they were let for twenty or thirty years. I did not exactly know for how long they were let. I did not for a certainty know what kind of lease was made of them. I did not know whether there was a lease in fact or a tenancy. I had heard from Mr. *Butcher* that *Richardson* and *Wrench* had some lease or document from *Elliott*, but I never found out what it was. It is false what is read to me (*evidence of Maguire*). Mr. *Maguire* told me he came concerning a property which *Smith* had a lease of, and I told him that I let it to Mr. *Smith*, with the clear understanding for £12 a year to be received by Mr. *Smith* for the two cottages. The rent payable up to February 1865, to *Elliott*, was £12 a year. I told *Smith* that he was to get £12 a year from the tenants of the two cottages. What I said to Mr. *Maguire* was, that *Smith* was to have £12 a year, and not anything about ground rent. Both plaintiff and Mr. *Maguire* are inaccurate in what I said and what I meant. On the 6th of February, 1865, I did inform *Smith* that the cottages were let at £12 a year. He was to get £12 from the tenants of the cottages."

The rules of equity as to the transaction in February, 1865, are quite clear as stated by Lord *St. Leonards* (a), viz.: "that notice that part of the estate is in possession of a tenant is notice of a lease, or that it is in possession of a person named and his under tenants." See also *Bythewood's Conv.*, by *Jarman* (b).

(a) V. & P., p. 626, 13th ed.

(b) Vol. 1., p. 100.

The long list of authorities from *Taylor v. Stibbert* (a), before Lord Chancellor *Rosslyn*; *Hiern v. Mill* (b), before Lord Chancellor *Erskine*; *Daniels v. Davidson* (c) and *Allen v. Anthony* (d), before Lord Chancellor *Eldon*, all which authorities have been recently considered in the modern cases of *Jones v. Smith* (e), before Vice-Chancellor *Wigram*, confirmed by Lord Chancellor *Lyndhurst* (f); *Penny v. Watts* (g), before Lord Chancellor *Cottenham*; *Bayley v. Richardson* (h), before Vice-Chancellor *Turner* now Lord Justice; and, lastly, *Barnhart v. Greenshiels* (i), before the Privy Council, have established clear principles of sound equity applicable to this case, from which I cannot in any degree depart.

1866.
BURNS
v.
LONG
and another.

In addition to these authorities many other cases more or less analogous to the present might be easily cited; but I will only mention the recent case of *Leigh v. Lloyd* (k), in which Lord Chancellor *Cranworth* held that if a party who had notice that there "*was a mortgage subsisting*, chooses to take an assignment without ascertaining the particulars of such mortgage, he is bound by all its terms and consequences."

In this case the evidence discloses not merely that the defendants *Long* and *Smith* had actual notice of "the lease" to the plaintiff *Burns*, but also the acquiescence of the defendant *Long* in the terms of such lease, as to rent and days of payment of such rents, and the communication to the other defendant *Smith* of such acquiescence before and immediately in connection with such defendant receiving his lease for three years. Consequently, taking all the facts together, I cannot separate the transactions of 10th and 18th February from the purchase deed and lease of 6th February; but the whole transaction must be considered as the same *res gestæ* the facts and circumstances of which cannot be separated from each other, nor to be

(a) 2 Ves. 437 (1794).

(c) 16 Ves. 249 (1809).

(e) 1 Hare 41 (1842).

(g) 1 M'N. & G. 150 (1849).

(i) 9 Moore, 18 (1853).

(b) 13 Ves. 121 (1806).

(d) 1 Mer. 282 (1816).

(f) 1 Ph. 244 (1843).

(h) 9 Hare 734 (1852).

(k) 2 De G. J. & S. 330 (July, 1865).

1866.

BURNS
v.
LONG
and another.

understood without mutual reference to all the other surrounding circumstances connected with and purporting to carry out the one main fact, as one continuous act or transaction with regard to both defendants; *Taylor* on Evidence (a). I may also observe that there seems to have been every intention in February, 1865, to support the existing lease, rather than to overturn it, or repudiate any of its provisions. Now, while I admit that mere notice of a tenancy is not, *per se*, notice of the title of the lessor, I am equally clear, firstly, that a mortgagee purchasing the equity of redemption in the mortgaged property, without the intervention of a trustee, or without a bill of foreclosure, cannot set up his mortgage against the present plaintiff, but takes his purchase of the estate precisely as any other purchaser; and, secondly, that such purchaser having notice, even of occupation alone, or of any lease whatever, is bound by all the equities which such occupiers or tenants can insist upon. Applying these principles and authorities to the present case, I am of opinion that the plaintiff is entitled to the decree he seeks by the prayer of his bill. A contrary decision would be to introduce doubt and uncertainty into a branch of equity,—the doctrine of notice, which affords the only effectual protection to a very large class of equitable interests, against the technical legal effect of secret conveyances.

(a) Vol. 1., p. 459—469.

1866.

BERRY and others *against* STIRLING and others.

THE original bill in this suit was filed on the 3rd of June, 1856. The plaintiffs, *A. Berry, W. Macpherson*, and *W. Lithgow*, were shareholders of the Bank of Australia—a joint stock company established at Sydney in 1833—and sued “on behalf of themselves and any others of the shareholders, who had not been repaid their proportion of the sums contributed by them for the discharge of the liabilities of the said Bank, and which had not been applied for that purpose.” The defendants, *J. Stirling, T. W. Smart, R. Campbell, J. Gilchrist, W. S. Macleay, J. Norton, S. A. Donaldson, W. Lee, G. Bowman*, and *J. Mitchell*, were—each for some period, during the course of the transactions referred to in the bill—directors of the Bank of Australia.

It appeared that in the beginning of the year 1843, the Bank of Australia being in great pecuniary difficulties, found it necessary to borrow large sums for the purpose of meeting its liabilities; and its then directors having applied to the Bank of Australasia for assistance, obtained a loan of £150,000, at ten per cent. interest, but on conditions which involved the complete winding up of the affairs of their own bank.

In November, 1844, the Bank of Australasia brought an action in the Supreme Court against *T. C. Breillat*, the then Chairman of the Bank of Australia, for the recovery of the debt due on foot of the said loan. A special verdict was found—and the judgment of the Court thereon, delivered 8th September, 1845, was in effect in favour of the defendant; but on appeal to the

The Bank of Australia being under heavy liabilities, which its directors intended to pay off by repeated calls on the shareholders—enforcing such calls by the aid of a *sci. fu.* on a judgment obtained by the Bank of Australasia—the plaintiffs after paying two calls, compounded, by an immediate payment, for releases from all future liabilities as shareholders. The releases were given, but no transfer of the shares was made. After the releases, the liabilities of the Bank were paid off, and a surplus remained, which, by a resolution of the shareholders passed in March 1851, was distributed among such

shareholders as had paid all the calls, and who had not received releases. In June, 1856, the plaintiffs filed their bill, claiming a share in the surplus.

Held, that the releases obtained by the plaintiffs, as they exonerated them from further liability, also excluded them from participation in the surplus distributed among the shareholders who had paid their calls, but not received releases.

Held also, that the plaintiffs were precluded from obtaining the relief sought, by their delay in applying to the Court.

Held, lastly, that the suit was objectionable for misjoinder and want of parties—the directors alone being made parties defendants.

1866.

BERRY
and others
v.
STIRLING
and others.

Privy Council this decision was reversed, and it was ordered (15th April, 1848), that judgment should be entered up for the Bank of Australasia as of the date of the original judgment, for the sum found due by the verdict, with subsequent interest, at the rate agreed upon in contracting the loan (a). Judgment was accordingly entered up in the Supreme Court against the Bank of Australia, as of the 8th September, 1845, for a sum exceeding £200,000.

On 7th August, 1848, a general meeting of the shareholders of the Bank of Australia was held, and it appearing that only a part of the judgment debt had been paid, and that the ordinary assets of the Bank would be quite insufficient to satisfy it fully, a resolution was passed, that a call should be made on all the shareholders, of 100 per cent. on the amount of their stock, for the purpose of liquidating the balance then remaining due. In order to render this call effective, the directors of the Bank of Australia entered into an arrangement with the Bank of Australasia, by which it was agreed that the last mentioned Bank should issue a *scire facias* on its judgment, against such of the shareholders of the Bank of Australia as should not pay the call. This agreement, the plaintiffs alleged, was entered into on the part of the directors of the Bank of Australia, with the view "of enforcing payment of the call by such of the shareholders as were solvent, or whom they desired to make contribute thereto." On the other hand, the answers of the defendants *Campbell, Smart, and Gilchrist*, gave the following view of the transaction—"All the shareholders in the Bank of Australia, resident in the colony, were liable to have the said judgment immediately enforced against them for the full amount of principal money and interest due thereon, and were in consequence exposed to ruin, which could be averted only by measures being taken whereby the Bank of Australasia should be induced to afford time and indulgence, so as to enable the said shareholders to raise funds to pay off the said judgment debt gradually, and in proportion to their

(a) See *Bank of Australasia v. Breillat*, 6 Moore P. C. C. 152.

liabilities and means; and, *with that view*, it was considered proper that the said judgment should not be put in force against such of the shareholders as should be willing, fairly and without litigation, to contribute what they respectively, reasonably ought towards the payment thereof, but that the said judgment should be enforced against such of the shareholders as should refuse, though able, to pay their aforesaid fair proportions. Accordingly, with such views as aforesaid, and shortly after the said order in Council (made in pursuance of the decision of the Privy Council above referred to) was received in the colony, we and the other then directors came to an arrangement or understanding with the said Bank of Australasia, which was greatly for the benefit of the shareholders of the Bank of Australia; and which was to the effect, that in case the said directors of the Bank of Australia should, by means of making calls or otherwise, raise the necessary moneys, and pay off the said judgment debt by instalments, the Bank of Australasia should give time for such payment, and should, moreover, not seek to enforce the said judgment, except against such of the shareholders of the Bank of Australia as should not fairly contribute towards the discharge of the said judgment, and so far as to compel them so to do." It appeared also that this arrangement was approved of and confirmed by the shareholders.

On 10th August, 1848, circular letters were issued, in pursuance of the resolution of the 7th of that month, to all the shareholders, for payment of the call; and amongst others, the plaintiffs *Berry* and *Macpherson*, together with Colonel *Thomas Shadforth* and *Henry Mackenzie*, were applied to for the sum of £2500, being £100 per cent. on the stock held by them jointly. This call was fully paid by the plaintiffs *Berry* and *Macpherson*—Colonel *Shadforth* and *Mackenzie* being unable to pay their proportions.

On 8th October, 1849, a further call was made, in pursuance of a resolution of the shareholders, of £100 per cent. on the amount of stock. On this call also, the sum of £2500 was paid by the plaintiffs *Berry* and

1866.

BERRY
and others
v.
STIRLING
and others.

1866.

BERRY
and others
v.
STIRLING
and others.

Macpherson, under circumstances similar to the preceding. The plaintiff *W. Lithgow*, paid £820 on foot of these calls, being £200 per cent. on the stock held by him.

The plaintiffs alleged that they were compelled to pay these calls, under the pressure brought to bear upon them by the directors, who threatened that unless they paid, the Bank of Australasia would issue a *scire facias* against them, on foot of the judgment before referred to.

There was considerable delay and difficulty in obtaining, from the shareholders, payment of the second call, as also a third, which it appeared was subsequently made, for the purpose of equalising the contributions under the two first.

At this time the Bank of Australasia was constantly pressing for payment, and it was therefore of importance to all concerned that immediate sums should be realised. The Bank of Australia still possessed considerable unrealized assets—principally landed property and mortgages; but the condition of the colony was such that these assets could not be realised, but by forced sales—the proceeds of which would be greatly insufficient to meet the unpaid balance of the judgment debt. It was hoped, however, that by delay, the assets might be sold to more advantage; and, in the meantime, the directors (as they said) were ready to negotiate with any shareholder who, desiring to retire from the concern, and to be released from further liability, should be willing to compound for any probable future calls upon him, by immediate payment of a reasonable sum. In such negotiations it was understood, that under the arrangement between the directors of the Bank of Australia and the Bank of Australasia, any shareholder of the former, receiving a release, would be exempt from further calls on account of the judgment debt, and saved from any further proceedings to compel payment, whether by the *scire facias* or otherwise.

The plaintiffs *Berry* and *Lithgow*, entered into a compromise of this sort—each of them paying £1000 in addition to the calls already paid by them, and receiving

releases from further liability to any calls or contributions on account of the said judgment debt, "or otherwise by reason of their being shareholders in the Bank of Australia," such releases being signed by the defendant *Stirling*, as chairman of the bank. They alleged, however, that they were *compelled* to pay this further sum; "the directors having, through means of the judgment hereinbefore mentioned, complete control over such of the shareholders as were solvent." And as no transfer of their shares was ever made, the plaintiffs charged that they still remained shareholders of the Bank of Australia—subject to the liabilities, and entitled to the benefits arising from such character. The defendants, however, submitted that such transfer of shares, though effected, would be only a mere matter of form, as the bank was in the course of winding up; and that it was understood, that in accepting the releases, the plaintiffs ceased to be interested in the assets, or liable for the debts of the bank as shareholders.

Sometime after these compromises were effected, the colony gradually rose from its depressed condition; the unrealised assets of the Bank of Australia greatly increased in value; several sums previously considered doubtful or irrecoverable were recovered by the directors; and the Bank of Australasia, moreover, consented to reduce its claim by about £20,000 chargeable for interest. Under these circumstances, the directors of the Bank of Australia proceeded to realise their assets, and found that after fully satisfying the claim of the Bank of Australasia and their other liabilities, there would remain a considerable surplus. The improved prospects of the bank were communicated to a general meeting of the shareholders on the 31st of March, 1851, and a resolution was thereupon passed, that the surplus should be returned to such shareholders as had paid their second and third calls (that is, the second call of 100 per cent, and the third call which was made upon certain shareholders to equalise the payments on the shares), and *who had not received releases*, in the proportion of the

1866.

BERRY
and others
v.
STIRLING
and others.

1866.

BERRY
and others
v.
STIRLING
and others.

amounts of such second and third calls paid by each shareholder to the total amount of the surplus.

In pursuance of this resolution, surplus funds to the amount of £12,000 and £6000 were, at different times, rateably divided among the shareholders entitled in terms of the last mentioned resolution. A small sum was retained for the expenses of the management and winding up.

The plaintiffs alleged that the surplus amounted to much more than the sums above stated; and charged that the defendants were trustees of the same for the plaintiffs and such of the other shareholders as had paid the sums levied by the defendants as directors of the Bank of Australia; and prayed for an account of the calls, and how the same had been disposed of; and for a declaration that the defendants were trustees of the surplus for the plaintiffs and the other shareholders who had contributed thereto, and who had not been repaid their proportion of the contributions remaining after the discharge of the bank's liabilities; and for an injunction to restrain any further payments out of the balance remaining in the defendants' hands.

The defendants submitted that the bill shewed a want of equity; that the plaintiffs having so long acquiesced in the distribution, were precluded from complaining now, and were, moreover, barred, by the releases received by them, from the relief sought; that all the shareholders who had participated in the surplus, had interests adverse to those of the plaintiffs, and should have been made parties, but were not represented in the suit; that all those who had received releases should also have been made parties, and having distinct cases and equities, could not be represented by the plaintiffs; and that the suit was consequently defective for want of proper parties.

The plaintiff *Lithgow*, and the defendants *Macleay* and *Norton*, having died during the course of the proceedings in the suit, their representatives were made parties by revivor.

At the hearing the following cases were cited by

Sir *W. M. Manning*, Q. C., *Martin*, Q. C., and *Blake* for plaintiffs. *Bromley v. Williams* (a), *Long v. Yonge* (b), *Cockburn v. Thompson* (c), *Prendergast v. Turton* (d), *Brotherwood v. The Agriculturist's Insurance Co.* (e), *Re Cameron Colebrooke Railway Co.* (f), *Bank of Australasia v. Breillat* (g), *Walworth v. Holt* (h), *Clements v. Bowes* (i).

Broadhurst, Q. C., and *Oliver* for defendants *Smart* and *Gilchrist*.

Stephen, for defendant *Stirling*, cited *Richardson v. Larpent* (k), *Gregory v. Patchet* (l), and *Clegg v. Edmonson* (m).

Darley and *Butler* for defendant *Campbell*. *Kent v. Jackson* (n), *Sibley v. Minton* (o), *Graham v. Birkenhead, &c., Railway Co.* (p), *Duke of Leeds v. Earl Amherst* (q), *Browne v. Cross* (r), *Lewin on Trusts* (s), *Purves v. Lang* (t).

Gordon for all the other defendants. *Carlisle v. Birkenhead Co.* (u).

Sir *W. M. Manning* in reply as to misjoinder. *Story's Equity Pleading* (v).

The PRIMARY JUDGE now gave judgment as follows:—

In this case I am clearly of opinion that the plaintiffs ought not to be allowed to proceed with this suit, and for the following reasons:—

In the first place, the resolution of the shareholders of the Bank of Australia, dated the 31st March, 1851,

(a) 32 Beav. 177.

(c) 16 Ves. 321.

(e) 31 Beav. 365.

(g) 6 Moore's P. C. C. 152.

(i) 16 Jur. 96.

(l) 10 Jur. 1118.

(n) 14 Beav. 367.

(p) 2 McN. & G. 146.

(r) 14 Beav. 105.

(t) 1 Sup. Ct. R., Ap., p. 4.

(v) p. 277.

(b) 2 Sim. 385.

(d) 1 Y. & C. 98.

(f) 18 Beav. 339.

(h) 4 M. & C. 619.

(k) 7 Jur. 691.

(m) 3 Jur. N. S. 299.

(o) 27 L. J. Ch. 53.

(q) 2 Phil. 123.

(s) pp. 571, 597.

(u) 1 McN. & G. 689.

1866.

BERRY
and others

v.
STIRLING
and others.

December 18,
19, 21, 1865.

February 2,
1866.

1866.

BERRY
and others
v.
STIRLING
and others.

whereby the "surplus money of the bank" was ordered to be returned to the shareholders who had paid their additional calls, and *who had not received releases*, was undoubtedly known to the plaintiffs at the time; and the defendants' answers distinctly raise the point, that the plaintiffs have, by their acquiescence, precluded themselves from complaining of the payment of the returns made under that resolution, either to the defendants or the other shareholders who had not received releases.

The principles applicable to such a case as this are thus stated by Lord Chancellor *Cottenham*, in the *Duke of Leeds v. Earl Amherst* (a), "If a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain;" and again, in the case of *Graham v. Birkenhead, Lancashire, and Cheshire Junction Railway Company* (b), the same Lord Chancellor, applying the same principle in still more distinct language to a state of circumstances very similar to the facts of the present case, says, "Was it not the duty of those who meant to dispute this course of proceeding to make an application at once to a Court of Equity to prevent it?" and if they make no such application, "they thereby give rise to a new equity against themselves, *depriving them*" of their former rights, if any.

It is quite unnecessary for me to point out the extent to which this well established doctrine of acquiescence affects all our equitable proceedings; but I think there are no cases in which this doctrine should be more carefully guarded and maintained than in cases like the present; where directors of public companies and shareholders meet openly and with all due regularity, and without, even now, the slightest imputation of concealment, fraud, or misrepresentation, proceed to pass resolutions authorising the division of the company's moneys, or otherwise dealing with the business of the company, inconsistently with the alleged rights of other shareholders or quasi-partners or shareholders. Unless such dissatis-

(a) 2 Phil. 123 (1846).

(b) 2 McN. & G. 146 (1850).

fied shareholders or quasi-partners, who avowedly deserted the company when in difficulties, come for relief to this Court, with due diligence, and unless the equitable doctrine of acquiescence be maintained in its full force, I am satisfied that our commercial community, more especially in respect to all the transactions of public companies and all partnerships, must remain in a most perilous condition.

Applying this doctrine to the present case, it is quite clear that, inasmuch as all the equity even alleged in this bill on behalf of the plaintiffs existed prior to the meeting of March 31st, 1851, the delay which elapsed between that date and the filing of the present bill on June 3rd, 1856, has precluded them from any relief in this Court. They now claim to be treated as shareholders and partners in this bank, although after their release this resolution of March, 1851, was acted upon without any objection during three several public distributions of money—two in 1851, and one in 1855; and if their exclusion from such distributions was a proper matter of complaint in this Court, it is impossible now for me, upon a bill filed in 1856, under the circumstances proved in the case, to allow these plaintiffs to harass with litigation, either the directors or the shareholders, who have thus acted openly and with perfect *bona fides* throughout these transactions, either by directing any of the accounts asked by the bill, or by attempting to follow out and recoup from the shareholders, one or more of these distributions, even if erroneously made.

In the second place, I think it right to state that, upon the evidence in this cause as to the circumstances attending the release taken by the plaintiffs against future calls as shareholders, I am satisfied that such releases were given by the defendant *Stirling*, and accepted, without any misrepresentation or misunderstanding—were a complete and effectual protection, in fact, against any such future calls; and that the plaintiffs have received and enjoyed the full benefit of the compromises they then made with the other shareholders. The evidence has also satisfied my mind that no fraudulent or

1866.

BERRY
and others
v.
STIRLING
and others.

1866.

BERRY
and others
v.
STIRLING
and others.

inequitable use was ever made of the existing *scire facias*, so as to entitle the plaintiffs to claim any exemption from the legal and equitable effect of such release, on the ground of any compulsion, duress, or pressure. On the contrary, the whole evidence shows that Mr. *Berry*, especially, entered into the compromise effected by his release, with a full knowledge of all the facts, and that he did so voluntarily, and without any pressure whatever, and with a view to his own protection and release from his lawful liabilities.

With regard to the legal and equitable effect of the release on the position of a shareholder, as between co-partners, or co-shareholders, I am of opinion that the indemnity thus given and accepted *bona fide* by the plaintiffs, and subsequently effectually acted upon by all other parties, did exclude these released shareholders from any right to any subsequent profit, or any interest in the subsequent surplus divided under the resolution of March 1851. It seems to me of the essence of participation in profits, that there should be concurrent liability to losses. I think, therefore, that upon the facts and equities of the case, the resolution of 1851 could not have been successfully impugned, even if the plaintiffs had come to this Court for that purpose, immediately after the resolution was passed.

I am not aware of any express decision upon the present point; but upon the general principles of the law of partnership, which, of course, governs the shareholders of the joint stock companies, as between themselves, when the company's deed does not provide for any specific trust, I am clearly of opinion that a shareholder who accepts a *bona fide* indemnity, or a release from his co-shareholders of all future liability, thereby necessarily, and by equitable implication, precludes himself, not only from all participation in profits, but from any subsequent beneficial interest in the partnership assets.

It has, indeed, been argued, that the delay in filing the present bill has been satisfactorily accounted for by the personal demeanour of Mr. *Gilchrist* in looking

fiercely at Mr. *Berry* when he met him in the street, and by Mr. *Berry's* continued dread of the enforcement of the *scire facias*. But if he had come to this Court for an injunction on any account similar to this bill, he would have had the injunction extended to the *scire facias*, as easily as to any other inequitable conduct of the defendants, if any. It seems to me, therefore, that such arguments are altogether unworthy of the attention of this Court, either as constituting in themselves any degree of duress, either legal or equitable, before 1851, or as affording any reasonable excuse for the delay in the interval, from 1851 to 1856.

Lastly—There are other grounds of objection fatal to the suit in its present state, such as misjoinder of plaintiffs having opposite and conflicting interests with other shareholders whom they assume to represent, and between themselves—for I only find that two of the plaintiffs accepted releases—and also as not being entitled to sue on behalf of the non-receiving shareholders generally, as assumed by the first paragraph of the bill. The bill also seems objectionable, for non-joinder of other defendants, as directors and shareholders. But without entering into detailed criticism of the pleadings or evidence, I think I have already stated enough to show that the present bill ought to be dismissed with costs.

1866.
BERRY
and others
v.
STIRLING
and others.

The plaintiffs having appealed from this decree, the case was brought on for rehearing before the full Court (a).

June 25.

After hearing counsel for the appellants, the Court without calling on the respondents' counsel, dismissed the appeal with costs.

June 27.

(a) Coram, Sir A. Stephen, C. J., Hargrave, J., and Fancett, J.

1866.

August 15,
1866.WYSE *against* HEGGARTY.

An order to open biddings will not be made until after the Master has made his report as to the sale.

AT a sale which took place on the 19th June, 1866, of certain premises directed by the decree in this suit to be sold, *Charles Edghill* became the purchaser of two lots.

Butler, for *James Wyse* the plaintiff and an intending purchaser, who had made the necessary affidavits, now moved for an order to open the biddings.

Gordon for *Edghill*. It appears that the Master has not yet reported on the sale. No order can be made to open the biddings, because as yet there has been no allowance of the purchase. The case of *Lovegrove v. Cooper (a)* is an authority in point.

The PRIMARY JUDGE refused the motion with costs.

August 28.
September 19SHEPHERD and others *against* GOODEY and wife.

W. S., by his will, declared "my will and meaning is, that my wife shall, during

the term of her natural life, be and remain in possession of all my household goods, &c. ; and that the remaining personal property—such as money—*shall be for her use and benefit*, and for the purpose of maintaining my eight children, so far as the same will go." He also devised his real property upon certain trusts to his wife, whom he appointed his executrix and trustee and guardian of his children. His widow entered on the trusts, and afterwards intermarried with T. B. G. without settlement. A sum of money, the produce of W. S.'s estate, and which, since his death, stood in the bank in the name of his widow, was, after her second marriage, drawn out by her and handed to her husband, T. B. G., who applied it to his own use, without giving any security for its repayment. The children had always been properly maintained by Mrs. G. since the testator's death.

Held, that the said sum was part of the testator's personal assets, and subject to the trusts of his will, and that T. B. G. and wife—the former having constructive notice of these trusts—had, in respect thereof, committed a *devastavit* and breach of trust respectively, and T. B. G. was decreed to refund the money—allowance being made for any outlay by him out of that particular fund in the improvement of the trust property.

(a) 9 Hare 279.

THIS was a Bill filed by *William Shepherd* and others, the children of *William Shepherd*, deceased, against *Thomas Berrington Goodey* and *Ann* his wife, formerly *Ann Shepherd*, the mother of the plaintiffs, praying that

the trusts of the late Mr. *Shepherd's* will might be carried into execution, and the rights of the plaintiffs declared—also, that the usual accounts of the testator's personal estate might be taken, and, in particular, how much thereof had been received by, or come to the hands of, the defendant *T. B. Goodey*, and that he might be decreed to replace the amount thereof, or to give security therefor to the satisfaction of the Court.

The testator died in December, 1855, leaving a widow and eight children and a considerable amount of property, real and personal. His real estate (which included a mill at Chippendale near Sydney) produced, at the time of the suit, a rental of about £1200 per annum. By his will, dated 1st October, 1855, the testator appointed his wife executrix and trustee of his will, and guardian of his children. The provisions of the will, so far as they relate to the questions now raised, were as follows :—

“ My will and meaning is, that my said wife shall, during the term of her natural life, be and remain in possession of all my household goods, chattels, and furniture, of what nature and kind soever ; and that the remaining personal property—such as money—shall be for her use and benefit, and for the purpose of maintaining and educating my eight children hereinafter named, so far as the same will go. I give and devise all my real estate, of what nature and kind soever and wheresoever, unto my said dear wife, *Ann Shepherd*, upon trust, to receive the rents, issues, and profits thereof, and therewith to maintain herself and support and educate my eight children, *William, Joseph, James, Charles, Ellen, Ann, George, and Mary*, infants of tender age, until the youngest or only one, as the case may be, shall attain the age of twenty-one years, and upon such event happening to divide the proceeds of the real estate, or the property itself, as may be determined on by a majority of my said children, equally between all of my said children, saving and retaining to herself, my said wife, a share equal to the share or part of my said children ; or, if there be only one, between her, my said wife, and such only one.”

The testator also appointed *John Dalley* an executor and

1866.

SHEPHERD
and others
v.
GOODEY
and wife.

1866.
 SHEPHERD
 and others
 v.
 GOODEY
 and wife.

trustee of his will, for certain special purposes, but Mr. *Dalley* did not prove the will or enter upon the trusts. There were also two codicils executed by the testator, one bearing even date with the will, the other dated 28th November, 1855, but their contents did not affect the determination of the points in issue. In April, 1857, the testator's widow, who alone had proved the will and acted in the trusts, intermarried with the defendant, *T. B. Goodey*. No settlement was made upon their marriage.

Mrs. *Goodey* having died before the hearing, the suit was revived against her representative. A receiver and a guardian of the infant plaintiffs and trustees of the will had also been appointed by the Court.

It appeared that from the testator's death up to the death of Mrs. *Goodey* she had maintained and educated the testator's children, and no questions or complaints were raised in the proceedings against Mrs. *Goodey* in that respect.

August 28.

The main question argued at the hearing related to a sum of £1600, which appeared to have been drawn out of the Bank of New South Wales on the 25th of June, 1857, being part of a sum of £1836 4s. then standing in the names and to the credit of the defendant, Mrs. *Goodey*. The cheque for the £1600 was signed by Mrs. *Goodey*, but the body of the cheque was in the handwriting of *T. B. Goodey*, and the proceeds of it came into his hands and were applied by him to his own use. The Bill charged that this sum was part of the assets of the testator, and subject to the trusts of his will in favor of the plaintiffs—that it had been improperly drawn by the defendant, *T. B. Goodey*, or lent to him by Mrs. *Goodey*, without security, and that a breach of trust and *devastavit* had been committed in respect thereof by the defendants respectively. The defendant, *T. B. Goodey*, admitted that he had given no security for the repayment of the sum, but said that it had been given to him by Mrs. *Goodey* for his own use. The evidence as to the circumstances under which the sum came to the hands of Mr. *Goodey*, and the manner of its application, is set out fully in the judgment of his Honor the Primary Judge.

Sir *W. M. Manning*, Q. C., and *Blake* for plaintiffs, cited *Jarman on Wills* (a) ; as to *T. B. Goodey* recouping the money received by him, *Adair v. Shaw* (b) ; as to *devastavit*, *Crockett v. Crockett* (c) ; and generally *Leake v. Robertson* (d), *Phipps v. Williams* (e), *Thorp v. Owen* (f), *Scott v. Key* (g), *Longmore v. Elcum* (h), *Re Harris* (i).

1866.
SHEPHERD
and others
v.
GOODEY
and wife.

Gordon for defendant *T. B. Goodey*. It is submitted that there was no trust affecting the personality. The money drawn out of the Bank belonged to Mrs. *Goodey* under the true construction of the will. Cited *Jarman on Wills* (k), *Biddles v. Biddles* (l), *Holmes v. Taggart* (m).

Blake was heard in reply.

The PRIMARY JUDGE now delivered judgment. After September 19. stating the general facts of the case and the question at issue, his Honor continued as follows :—

It is necessary to examine carefully and to compare Mr. and Mrs. *Goodey's* evidence, to ascertain the real facts and circumstances under which the cheque for £1600 was drawn and paid, and as to the application of that sum.

With regard to the commencement of the banking account Mrs. *Goodey*, in her evidence says :—" Some money was in the Bank of New South Wales at the time of my first husband's death in my name. The amount was £2100 at my first husband's death. It was the money accumulated from my first husband's property during his lifetime. A few days before his death it was transferred to my name. It was put in my name because my husband was too ill to sign the deposit note."

With regard to the drawing out the £1600, she says : " I remember a transaction about £1600, part of this money. I recollect the 25th June, 1857. I lent my

(a) 1 vol., p. 328.

(c) 2 Phil. 553.

(e) 5 Sim. 44.

(g) 11 Jur. N. S. 819.

(i) 7 Exch. 344.

(l) 16 Sim. 1.

(b) 1 Sch. & Lef. 262.

(d) 2 Mer. 363.

(f) 2 Hare 607.

(h) 2 Y. & C. C. C. 369.

(k) 1 vol., p. 331.

(m) 1 Sup. Ct. Rep. Eq. 27.

1866.

SHEPHERD
and others
v.
GOODEY
and wife.

husband, *Thomas Goodey*, £1600 on that day. I gave it him in cash. I went to the bank myself and drew it, and gave it over to him. The only arrangement with my present husband was, that he was to extend his business as a miller. Part of my late husband's property was a mill at Chippendale. My present husband carried on his business at the mill, part of my former husband's estate. When I gave it to him, I told him it did not belong to me, but to the children, and he said I could take it back at any time I required it. I have applied to him for it—the £1600; he has not repaid it; it is still due. He said the money was his and not mine, according to his marriage rights. When I gave him the money he did not require it as his own. I do not remember that he made any claim to it until I asked him to repay it. It was after I had proved the will that I gave him the money. My present husband was in possession of the mill for six years. He occupied it until we separated about four months ago. I think my eldest son *William* was present when I asked for the money to be repaid. He then made a claim to it, and said it was his own money."

Being cross-examined by Mr. *Gordon* for the defendant Mr. *Goodey*, she says:—"The £2100 was placed in my name about two or three days before my first husband's death. The illness was the only reason why it was placed in my name. The bank would not take that money without my husband's signature. I went to try to see if they would take it without his signature; they refused, and I put it in my own name until my husband got better. I did so without coming back and mentioning it to my husband. I took it down because I was afraid to keep it in the house. It was my husband's wish for me to do so. I understood that it was my husband's and mine, because I had helped to earn it. My husband had never given any of it to me. He never had said any of it was mine. I told him how I had put it in the bank, and he said I had done quite right. I told him that they would not take it without his signature, and that after he was well I could alter it. He said I had done quite right.

He had no banking account with the Bank of New South Wales. He had no bank at all. The money had been accumulating about three years during his illness. I proved the will. The goods were sworn under £100. I thought that this money was part of his property. I knew it was. My memory will not tell me when I paid the £1600 to Mr. *Goodey*. It was two or three months after I was married. I drew the money out with a cheque. Mr. *Goodey* drove me down in a dogcart, or else he walked down with me; nobody else was with me. Mr. *Goodey* had not any money, and I was not getting any interest from the bank. I offered of my own free will to extend the business with the money. I made the offer to him in my own house at Chippendale, next door to the mill; I told him I had a little money in the bank which did not belong to me, and he could have the use of it until such time as the children required it; those are exactly the words I did say. At first he said he did not care about taking it. I offered him a second time, and then he was glad to take it. He said I should have it back at any time I required it. The second offer took place on the day he got it; I had talked about it before. I am quite certain I never told Mr. *Goodey* that the £1600 was my own money. I am almost certain I handed him the money when I took it from the bank. I think I gave it to him in the street, if not, as soon as I came home to Chippendale. I am certain it was £1600. Between Mr. *Shepherd's* death I had put money in and drawn money out; and it was reduced from £2000 to £1600." She also says that she lodged money in the bank between Mr. *Shepherd's* death and the time of lending this money. "The money so lodged was not the private money of Mr. *Goodey*, it was the produce of *Shepherd's* estate. I do not remember how often I lodged money. Whenever I had any money of the estate, which was not wanted for the children, I paid it into the bank. All the money I paid into the bank was the produce of the estate. In the valuation for the probate, the household furniture was alone considered."

Against this very simple and consistent account by Mrs. *Goodey* of the transactions, we have Mr. *Goodey's*

1866.

SHEPHERD
and others
v.
GOODEY
and wife.

1866.

SHEPHERD
and others
v.
GOODEY
and wife.

admissions and evidence to the following effect :—That he remembers going with Mrs. *Goodey* to the Bank of New South Wales and getting some money, about three months after their marriage, having had a conversation with Mrs. *Goodey* the same day on which she said she had some money in the bank, which had been given her by her previous husband, which “she would get out of the bank and hand over to me for the purpose of carrying on the business.” He admits that she drew out the money, and that afterwards they drove to the Commercial Bank, and she handed him a roll of notes, which he deposited there in his own name, to the amount of £1350. He also says that he paid in at the same time £200 in notes, and that sum was “my own.” He denies that Mrs. *Goodey* ever “said anything about the money being a loan to me, or about my repaying it, or of its belonging to the children.” He says he has spent the £1350 in carrying on the business, and in improving the property round the mill and the mill itself.

Upon cross-examination, he says he does not know that he had read Mr. *Shepherd's* will before he was married or before he had the money ; but he has read the will many a time, and he will not swear that Mrs. *Shepherd* “did not show me the will before my marriage.” He also swears that he did not know the amount she drew out of the bank, though, on looking at the cheque (exhibit A), he admits that the words “sixteen hundred” and the figures “£1600” are in his own handwriting. He then says he believed the money in the bank was his and Mrs. *Goodey's*, but he did not ask her for it as his own property. He does not remember ever having refused the money, but he will not undertake to swear that he did not.

In considering the results of all this testimony it is plain to my mind that the fund in the bank was originally part of the testator's assets and subject to the trusts declared by the testator's will, and that Mr. *Goodey* has never, to the present hour, claimed this fund as his wife's, either as a *donatio mortis causa* or in any other marital right.

It is also equally clear to my mind that Mrs. *Goodey*

has always dealt with this fund as part of her first husband's estate, and applied it upon the trusts of his will for herself and the children, and her own statement as to the application of this fund, and her dealing with this bank account, are exactly confirmed by the bank account itself, and also, to a very great extent, by the defendant's own admissions.

With reference to the transaction of the 25th June as to this particular cheque for £1600, I am clearly of opinion that the defendant's conduct is wholly at variance with his own hypothesis, whether as claiming this money in his marital right, or as "being" his own and his wife's, —for in either case he had only to produce his certificate of marriage, when he might have claimed the whole fund, and not the £1600 only. Instead of which he has left the account in his wife's name, and it appears that after the 25th June she drew out other sums and paid in other sums, leaving at the close of the account a balance of £190 4s. to her credit on this account.

I consider Mrs. *Goodey's* act of drawing out the £1600 to be so plainly done under his marital control and influence, that the *devastavit* and breach of trust was substantially his own act and deed, for which he is liable, under the circumstances, as much as if he himself had presented the cheque and received the money. Consequently, the only reduction will be in respect of any outlay which he can prove to have been made upon improving the trust property out of this particular fund.

Considering also the very manifest equivocations of his evidence, especially as to filling up the amount of the cheque, and the strong documentary confirmation of Mrs. *Goodey's* truthfulness contained in the banking accounts, I have no hesitation in deciding that Mr. *Goodey* had constructive, if not express, notice of trusts affecting this sum of £1600, as part of the bank portion of the testator's assets held by Mrs. *Goodey* upon trust for herself and the children; and, consequently, that he must refund the money, as prayed by the bill.

The decree will therefore contain declarations to the above effect, and a direction to take the accounts as prayed, having regard to the above declarations.

1866.

SHEPHERD
and others
v.
GOODEY
and wife.

1866.

SHEPHERD
and others
v.
GOODEY
and wife.

I do not see that I can make any further declaration as to any other rights of the parties until the accounts have been duly taken and the net amount of the testator's assets ascertained. The receiver and maintenance to be continued. The defendant, *T. B. Goodey*, to pay the plaintiff's costs to the hearing. *Mrs. Goodey* to have no costs.

March 26.
October 3.

GORMAN *against* JONES (a).

The Master, in taking a partnership account of a station property purchased by the plaintiff and defendant jointly, gave credit to the plaintiff for £500, half of a sum of £1000 paid by the defendant on account of the purchase money—finding by his report “that there was cash of plaintiff's to the amount of £500 in the defendant's hands at the date of the purchase, and *which was dedicated or then ought to have been dedicated to that purpose.*”

On exceptions taken to this finding, *Held* (*Hargrave, J., dissentiente*), that the question, substantially, was whether or

APPEAL, by the defendant to the full Court, from an order of the Primary Judge overruling exceptions to the Master's Report.

The suit was instituted by *Richard Gorman* against *Rees Jones*, for the purpose of having it declared that a partnership existed between them in a station called *Taemas*, purchased in January, 1857, from one *Samuel Taylor*, and for a dissolution of the partnership and an account of the partnership dealings and transactions. At the date of the purchase the defendant was a store-keeper in *Yass*, and the plaintiff was residing then, or shortly before, on the *Taemas* station.

By decree, made on the 11th August, 1863, by the Primary Judge (the late Mr. Justice *Milford*), it was declared that the said *Taemas* station and stock were purchased by the plaintiff and defendant jointly, on the 19th of January, 1857, and had been ever since held and managed by them in co-partnership; and it was ordered that the partnership should be dissolved from the date of the decree; and that an inquiry should be made as to how and by whom the purchase money had been paid; and that the accounts should be taken upon the terms of equal profit and loss.

The Master made his report, in pursuance of this decree, on the 7th June, 1865, and found, *inter alia*, as follows:—“That the purchase money, amounting to the sum of £2500, was actually paid by the defendant

not the Master was right in giving credit to the plaintiff under the circumstances, for the £500 on the partnership account, specifically; and exceptions overruled.

(a) Coram, Sir *A. Stephen*, C. J., *Hargrave, J.*, and *Faucett, J.*

to the former owner, *Samuel Taylor*, in manner following, viz., on or about the 19th January, 1857, the sum of £1000 in cash, with the delivery of two promissory notes for £1500, payable three and four months after date, and that the said sum of £1500 was paid in cash and goods by the defendant, and that the two promissory notes have not been actually retired, but definitely satisfied, and the debt to the said *S. Taylor* extinguished, and that the sum of £500 ought to be set off or allowed as against the defendant's payment in cash of £1000 on the said purchase, there being cash of plaintiff's to the said amount of £500 in the defendant's hands on the 19th of January, 1857, and *which was dedicated or then ought to have been dedicated* to that purpose; and that the plaintiff is entitled to credit therefor in taking the accounts herein."

1866.

GORMAN
v.
JONES.

The defendant excepted to this report in respect to the credit allowed to the plaintiff for the £500, as a set-off against the £1000 paid on account of the purchase money. These exceptions were overruled, but without costs, by the then Primary Judge, Sir *Alfred Stephen*, C. J., his Honor being of opinion that the Master had found that the £500 was, in point of fact, dedicated to the purpose referred to, and that the Master was justified in so finding.

August 24,
1865.

It appeared that after the decree the defendant sued the plaintiff at law on a private account between them, and, in the action, gave the plaintiff credit for the £500 now in dispute.

The defendant now appealed from the order of the Primary Judge, and submitted the following amongst other grounds of appeal:—1st. That the Master, by his report, abstained from finding, and did not find as a matter of fact, that the sum of £500 had been dedicated to the purpose in the report mentioned, and that there was not evidence before the Master sufficient, in his opinion or in point of fact, to prove such dedication. 2nd. That the Master intended to find, and did find, as a matter of law, that the said £500 ought, under the circumstances of the case, to be taken to have been

March 26,
1866.

1866.

GORMAN

V.

JONES.

dedicated to the purpose referred to, but that such finding was erroneous. And 3rd. That the question whether there was in point of fact a dedication of the £500 to the purpose referred to, was not before the Primary Judge on the matter of the exceptions, and that these ought to have been allowed, if his Honor was of opinion that the finding of the Master could not be supported as a matter of law.

Sir *W. Manning*, Q.C., and *Gordon* for appellant.

The *Attorney General* and *Owen* for respondent.

October 3.

Judgment was this day delivered as follows:—

STEPHEN, C. J. In this case I retain my former opinion, for the reasons there expressed. But as these reasons, with the facts on which the contest has arisen, have not hitherto been stated in writing, I shall proceed to recapitulate them now.

In January, 1857, the plaintiff—a very illiterate man, then or shortly afterwards residing on the station of one *Taylor*,—agreed with the defendant, a storekeeper in the neighbourhood, for the purchase jointly by them of that station, and for its working thereafter in partnership together, in equal shares; it being understood that *Gorman* should manage the property, and *Jones* supply, as required, any necessary funds. Of the purchase money, £1000 was to be paid in cash,—the plaintiff then immediately (as he swears, but the defendant denies,) contributing a moiety, out of £674 then at his credit in *Jones's* hands. The defendant paid the £1000, accordingly, to *Taylor*; but not immediately, nor in cash. He paid it by the delivery of store goods—a mode, doubtless, more convenient for him, if not as convenient for the vendor. Then, having so done, and from time to time furnished the station with supplies, he advanced or paid moneys on *Gorman's* order (the latter continuing to reside on and manage the property), and also having in due course, by cash or goods, paid off the balance of *Taylor's* purchase money, the defendant, in 1862, denied the existence of any partnership, and claimed a considerable sum as due to him by the plaintiff.

The then Primary Judge, on very conclusive evidence, decreed, on the former point, in *Gorman's* favour; and the partnership accounts were directed to be taken. The late Master, in taking these, credited the plaintiff, on account of the purchase and partnership specifically, with the £500 (part of the £674) directed and agreed originally to be so appropriated; and the question is, simply, in effect, whether he was right in so doing.

It was my opinion, on exceptions taken to his report, that the Master was right. But the matter is embarrassed by the terms in which the particular finding was couched, and by another matter to which I shall advert presently. The Master so credits or sets-off that £500, on the ground that it had been *dedicated* in *Jones's* hands, "or that it *ought* to have been so," to the purchase mentioned. The vagueness of this language, and that it was sufficiently loose to excuse the objection taken, may be conceded. But, applied to the facts of the case, it struck me that the meaning could without difficulty be collected, and that it was this: that the £500 was directed to be applied to the partnership purchase, and therefore ought to have been so devoted accordingly. If the meaning of the alternative portion of the sentence was, that the money was either in fact set apart (dedicated) in *Jones's* hands, or that under the circumstances it ought to have been so set apart, I still think that the report is substantially right. For, after all, the question is that stated in the outset—whether the £500 was a proper item of set-off or credit, specifically, against the defendant's payments on partnership account. And the solution of this depends on the fact, according as it may be found for *Gorman* or against him, of the alleged direction and agreement to appropriate £500 out of the £674 already mentioned. That sum, according to the plaintiff, was expressly devoted to and meant to form part of the first instalment, or joint liability of the partners, then about to be paid by them. The defendant's case is, however, that he paid that £500 out of his own funds; and he debits

1866.

GORMAN
V.
JONES.

1866.
GORMAN
V.
JONES.

it accordingly, together with all his subsequent advances and payments. The effect in this suit is, that he makes *Gorman* out to be his debtor, on the partnership account, in exactly that amount more than the Master has allowed the defendant. And the Master was right in that respect, I apprehend, if the direction in question was made and assented to, by whatever name we call the arrangement.

The result to *Jones* (although not in this suit, nor on these partnership accounts) would practically have been the same, but for the circumstance now to be mentioned; with which it has been sought to complicate the case. Upon the decree being pronounced, *Jones* sued this plaintiff at law for the amount, whether in cash or by goods advanced on *Gorman's* separate account. In that action, *Jones* thought fit to credit the latter with this £500; and, failing (it is said) to prove a particular item of debit, the verdict passed for *Gorman*. With this result, or its alleged cause, as I conceive, we have here nothing to do. The giving of that credit was *Jones's* own act, for purposes of his own; over which *Gorman* had no control, and for which he cannot be made responsible—and the result, however unfortunate for *Jones*, leaves the question for our decision just where it was. It is impossible, indeed, without understanding all the details in that action, to see that injustice really will be sustained, after all, by this defendant—by reason of his having given that credit. We must previously be satisfied, that had a just and provable claim against *Gorman* in the action, to an amount beyond that £500; and to this conclusion the verdict is opposed. Nor, in any event, could *Jones* at his own pleasure make this item a credit on the separate, instead of the partnership account, by simply electing so to treat it.

As to the disputed fact, whether there really was a direction to appropriate the £500, as stated by *Gorman*, a very few words will suffice. In having given superior credence to the plaintiff, the master is not shown to be wrong; and, looking at the probabilities of the case, and the unworthy denial of the partnership by the defendant,

I am of opinion that the finding is right. The first instalment was a large one—nearly half the purchase money. It was to be paid in cash, not by either party alone, but by both; and *Gorman* had his moiety ready, in the defendant's hands.

1866.
GORMAN
v.
JONES.

The plaintiff afterwards, no doubt, required and obtained advances or supplies from *Jones*. But the amount of *these* only was on credit; not the original £500, or any portion of it. And this, by arrangement existing at the time; the effect of which is not to be destroyed, I take it—since the matter really at issue has been perfectly understood throughout—by an infelicitous mode of expression, or an erroneously stated reason. Nor can I regard a positive direction to appropriate, not repudiated or dissented from, as less in effect than a binding and understood arrangement (in other words an agreement), between the parties.

HARGRAVE, J. The single point raised by this exception to the Master's report is very simple, but of the greatest possible importance to every accounting party in every class of equity suit.

It appears that the late Master in Equity, in taking partnership accounts, has given this plaintiff credit for a sum of £500, which was in the defendant's hands to plaintiff's credit, as an item in a current store account, and which has always been to such credit of the plaintiff, in such store account, up to the present hour.

The words of the Master's report are that the said sum has been dedicated, or ought to have been dedicated, to the plaintiff's share of the purchase money of the station, the subject of this partnership.

The Master appears to have thought that the well known authority of *Clayton's* case in *Merivale's* reports, as to the *appropriation of payments*, applied to this case, but it is obvious that the rule as to the right of every payer of money to appropriate such *payment* specifically to one out of two debts on two separate accounts in such creditor's books at the time of such payment, can have nothing to do with any subsequent

1866.
GORMAN
V.
JONES.

direction, given long after payment, as to the wishes of the party in respect to any specific sum, at a previous time standing to his credit, in any person's accounts.

The simple question is whether, at the time of taking the present account, there was and is now a balance of £500 or of any sum standing to the plaintiff's credit, as being due to the plaintiff from the defendant on the store, or indeed on any account. This credit balance the plaintiff must make out in the usual way by proper evidence affirmatively, which he does not appear to have attempted. But what he has done is this: He has merely proved that, at the time of the purchase of the partnership station, he told the defendant to pay for his (the plaintiff's) share of the station out of his store account, which happened then to be in credit somewhat above £500.

To allow such a novelty in accounts as this item, under the perfectly unprecedented expression of a "dedication," or "quasi-dedication," would unsettle every system of accounts, and I confess that I cannot concur in any degree with so great an innovation upon equity and justice as is attempted by this report.

Lastly, it appears that this very item of £500 has moreover been already duly credited by *Jones* to *Gorman*, in a common law action upon the current store account between these parties, so that the effect of supporting the Master's finding will be in effect clearly to give to the plaintiff a second credit for the same item.

I am of opinion, therefore, that upon the grounds I have mentioned, that this exception ought to have been allowed by the Primary Judge, and the report referred back to the present Master in Equity for reconsideration.

FAUCETT, J. The bill in this case prayed that a partnership should be declared to have existed between the plaintiff and the defendant, in respect of a station alleged to be purchased on their joint account, and that an account should be taken of the partnership dealings. In pursuance of this prayer, a partnership was declared to have existed; and it was referred to the Master, to

take the accounts. And the substantial question which has now to be decided is, as it appears to me, whether the sum of £500, mentioned in the Master's report, ought to be credited to the plaintiff in the partnership accounts or not.

The difficulty in the case arises, chiefly, from the wording of the Master's report; and possibly, also, from some misconception on his part of the principle laid down in *Clayton's* case. But it appears to me that the Master did *in fact* credit the plaintiff with this sum of £500; and, when he says that it ought to be set off, as it was "dedicated, or ought to have been so," to the payment of the purchase money,—I think he must be taken to mean that, being in the defendant's hands, it was directed by the plaintiff to be so applied. Possibly he may have thought that, if it had not been directed by the plaintiff to be so applied, the law would, under the circumstances, have so appropriated it. But, however this may be, and whether he was right or wrong in his reasons, it appears to me that the Master did give the plaintiff credit for this sum in taking the partnership accounts; and found upon the evidence—and so intended to say in his report,—that the plaintiff had directed that that sum (as his share of the £1000, the portion of the purchase money to be paid in cash) should be paid out of the £674 belonging to the plaintiff, then in the defendant's hands.

And is it not probable that this was the case—assuming, as we must now do, that there was a partnership, on the terms stated in the memorandum of 19th January, 1857? According to that memorandum, the sum of £1000 was to be paid in cash on delivery. Out of what fund was the plaintiff's share of this £1000 to be paid, if not out of the sum then in the defendant's hands? There is no reason for supposing that the defendant would advance the £1000 out of his own funds, and retain in his hands the plaintiff's £674, either unused, or as a fund against which the plaintiff might draw on his own account. Up to this point, therefore, *the partnership being once established* on the

1866.
GORMAN
v.
JONES.

1866.
GORMAN
V.
JONES.

terms of this memorandum, I think that all the probabilities are in favour of the view, that it was intended at the time that the plaintiff's share of the £1000 should be paid out of his £674, then in the defendant's hands.

The case, however, is certainly embarrassed by the action at law commenced by this defendant; and, if it be really the case that the plaintiff has got the benefit of a set-off in that action, in respect of this £500, it is certainly not in accordance with justice that he should get credit in this suit also for the same amount, in respect of the same specific sum. The same observation will apply to any *portion*—if there be any—of the £500 for which he may have got the benefit of that set-off. But I confess that I cannot see my way clearly to the conclusion that the plaintiff did get the benefit of a set-off in respect of this amount; and, if the case is involved in difficulty on this account, the difficulty has been brought about by the defendant's own conduct; and, whatever may have been the result of the common law action, I think the view I have already stated is probably the correct one.

On the whole, therefore, I conclude as follows:—First, that the Master, substantially, has found that the plaintiff ought to receive credit in the partnership accounts for this sum of £500; secondly, that the Master has, as a fact, so given credit accordingly; and thirdly, as I do not see that he was wrong in so doing, that the report ought to be confirmed.

1866.

O'FERRALL and others *against* THE ATTORNEY
GENERAL and others (a).

March 28.
October 3.

THIS was an appeal by *Robert Johnson*, one of the defendants, from a decree made on the 8th November, 1865, by Sir *Alfred Stephen*, C. J., the Primary Judge; whereby it was declared that the said defendant was not entitled to any costs of suit, and it was ordered *inter alia* that he should pay certain costs of the other parties.

The suit was instituted by *Louisa* and *Frances O'Ferrall*, infants, by their next friend, against the Attorney-General, *Robert Johnson*, *Richard Johnson*, *A. A. Robson*, and *Louisa* his wife, *Rolla O'Ferrall*, and *Portia Burlton*, formerly *O'Ferrall*—the two last parties being out of the jurisdiction. The principal defendant, *Robert Johnson*, was the administrator, with the will annexed of *Rolla O'Ferrall*, deceased. Under that will the defendant, *Mrs. Robson*, was entitled to an annuity for life of £100, chargeable on all the testator's real and personal estate; and subject to such annuity, the defendants four children, viz., the plaintiffs and the defendants *Rolla O'Ferrall* and *Portia Burlton*, were entitled to the whole of the testator's property in equal shares.

The bill prayed for the establishment of the will and the execution of the trusts thereof—a partition of the real estate and the appointment in the meantime of a receiver—also for the usual accounts—and that if it should appear that any part of the testator's estate had not been duly applied by the defendant *Robert Johnson*, he should be charged with the loss occasioned thereby.

A receiver was appointed for the estate in September 1861.

In April 1862 the usual decree was pronounced by the late Mr. Justice *Milford*, the then Primary Judge, for the carrying out of the trusts, and the taking of accounts;

(a) Coram, Sir *Alfred Stephen*, C. J., *Hargrave*, J., and *Fauvelt*, J.

An administrator, with will annexed of a testator, who by his will charged all his real and personal estate with payment of an annuity, and subject to that gave all his property, real and personal, to his children, in equal shares, had advanced moneys to some of the children without having invested funds to meet the annuity, and it was subsequently found that the personalty was insufficient for that purpose. Held (*Stephen*, C. J., *dissentiente*) that the administrator, under the circumstances of the case, was entitled to his costs of suit out of the estate.

1866.

O'FERRALL
and others

v.

The
ATTORNEY
GENERAL
and others.

and an order directing further enquiries was made by the same Judge in December, 1864. On that occasion, his Honor made the following observations, from which the circumstances of the case may be seen:—"The duty of Mr. *Johnson*, after payment of debts, funeral and testamentary expenses, was to realize the personal estate, and, as he took possession of the real estate, to receive and retain the rents of it. He should have invested the personal estate on government or real securities, and out of the rents and the income of the personal estate to have paid the annuity, and to have divided the surplus into four equal parts—one for each child. The surplus income belonging to each child he should have paid to those of age, and he should have paid a sufficient part of the income of the infants for maintenance. Mr. *Johnson* had no power to dispose of the land or any part of the principal money arising from the personal estate. He might have invested the fund in hand in debentures, under 13 Vic., No. 19; but even then he could not have disposed of the principal money without the sanction of the Court. If his debtor and creditor account he does not charge himself with the receipt of any interest; so I must suppose he never received any, and, therefore, that he did not invest the personal estate. He has paid the annuity, which was the first charge; but if the money had been invested, the interest of that, with the rents of the real estate, would have been sufficient, in all probability, for that purpose; if not, the residuary legatees would not have been entitled to a single farthing. The capital of the personal estate and the land formed the security for the annuity. It is impossible to say what the plaintiffs in this case are entitled to, without ascertaining what Mr. *Johnson* was bound to pay them, on the supposition that what ought to have been done was done. It appears to me, that, taking the present accounts as the foundation of the inquiry, and not to be disturbed, yearly balances should be struck, and Mr. *Johnson* should be charged with interest on them." And the order was drawn up accordingly. On taking the accounts and making the

inquiries directed by this order, it appeared that Mr. *Johnson* had taken a mortgage, from *Rolla O'Ferrall*, of his one-fourth share of the real estate, to secure certain amounts overpaid him; and had, as such mortgagee, successfully resisted a proposal laid before the Master for a lease of the real estate to the annuitant's husband. After the payment into Court by him of a considerable sum, the cause came on before Sir *Alfred Stephen*, the Primary Judge, in August 1865, for further directions and costs; and on the 8th of November, 1865, his Honor made the decree now appealed against (*a*).

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

(*a*) His Honor in delivering judgment stated the facts of the case, and continued—

In some degree from the nature of the case, and the position of the parties, but infinitely more from the course taken, by irregular advances—if not over-payments—to the elder children, and to the annuitant, and by the omission to secure at any time her annuity out of specific funds, this matter is in a singularly embarrassing state. I have felt perplexed in the extreme, therefore, respecting the proper course to be taken by the Court—both as it respects the disposition of the property, and the apportioning of the costs, so as to do justice to all parties. But, after careful review of all the circumstances, I have come to the conclusion that—without casting any blame on the administrator, except for the irregularities to which I have referred, and of which some may have been due to importunities, imprudently complied with—I could not direct more than a portion of the costs to be paid out of the estate, and could not allow to him as a defendant any costs whatever. Accounts were rendered by him, it is true, before the suit was instituted. Further inquiries have been rendered necessary, however, by the irregularities adverted to. The plaintiffs, moreover, as well as the annuitant (who, although apparently indebted to him for unauthorised advances, has still a claim on the property for arrears), would have been in a better position, had not the administrator as mortgagee under young *O'Ferrall* opposed, in December 1862, and February 1863, a lease to her husband of the land. So that I am constrained to attribute to him, from these very irregularities, much of the existing difficulty that surrounds the case.

The rights of the parties under the will (most clearly explained by Mr. Justice *Milford*, in the observations which accompanied his order of December last), are easily understood and stated. All the testator's property, real and personal, was charged with the payment of the annuity; so that, except by her express consent—or by the setting apart of a specific adequate fund, to secure its payment—none of the capital could be touched by any of the children. The surplus income would belong to them, but that alone; although, after satisfaction of the annuity, the administrator probably might have divided the principal. Each of the four children, subject to that annuity, was entitled to an equal share, both in the real and the personal estates. The two elder, a son and daughter, became of age several years ago; and the administrator has paid—or appears to have paid, for I cannot so decide in their absence—to each of them the full amount of their eventual shares in the personalty, or more. The real estate, however, remains untouched; and the administrator took from the son, as already noticed, a mortgage (for the excess admitted by him) over his own undivided portion.

How, then, under these circumstances, is the annuity to be secured? The mortgage clearly cannot stand in the way. But the real estate, it

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.
March 28.

Sir *W. M. Manning*, Q. C., for the defendant *Robert Johnson* (appellant).

Gordon for the plaintiffs.

Wilkinson for the defendants the *Attorney-General* and *Richard Johnson*.

Darley for defendant *Louisa Robson*.

October 3,
1866.

Judgment was now delivered as follows :—

STEPHEN, C. J. Having, since the argument on this appeal, met my brother Judges in conference on the

seems to be admitted, will probably not now produce sufficient to meet the yearly sum required ; and it would plainly be unjust to charge more than a moiety of the deficiency (should there be any), on the accessible *personalty*—for that exclusively belongs to the infants. On the other hand, the adult devisees have apparently been paid their shares, and they are out of the colony. So that, as to this matter, the only practicable and appropriate order appears to me to be the following.

First, that the receiver shall forthwith let the real property for seven years certain ; with a provision in the lease for a further term of twenty-one years, should the annuitant so long live. Secondly, that the *rents*—not exceeding the amount of her annuity—be periodically paid to the annuitant. Thirdly, that the deficiency (if any) be made up from the accruing interest, on the funds invested to the credit of the cause—arising from the *personalty*. Fourthly, that the infant plaintiffs shall be chargeable, nevertheless, with two-fourths only of any deficiency so paid ; the administrator being personally bound, in my opinion, to make good the other two-fourths. Fifthly, that he shall accordingly forthwith pay into Court, after the making up of any such deficiency, the amount of such last mentioned two-fourths—to recoup the funds temporarily displaced.

With respect to the moneys now in Court to the credit of the cause, and the additions to be made thereto in accordance with the Master's report, dated the 6th June last, there is no difficulty. The defendant (the administrator) must at once, or within the usual time allowed in such cases, pay in the balance remaining due by him. That is to say, the difference between the sums paid under the original decree, and those found by that report to be due—being in respect of sums received by the defendant, on account of the real and personal estates respectively—including interest thereon, at the rate fixed by the order of 1864, up to the date of that order. He must also, of course, pay at the same time interest (at the rate so fixed) on the balance, from that date to the present. All these sums, with those already in Court, must be carried to the credit of the cause generally—for the annuitant's protection—but they will eventually belong to the plaintiffs, of course, in equal parts. In the meantime, the funds will continue to be invested as heretofore.

Now as to the costs. As already intimated, I am of opinion that no costs can be allowed to the administrator. I think further, that he must pay all parties their costs, severally, of the proceedings subsequently to the hearing in November, resulting in the order of December last—including the costs of, and incident to, that order. All the other costs of those parties will, eventually, come out of the funds in Court ; those of the Attorney-General, and the annuitant (or rather of her trustee) being, in the first instance, payable by the infants' next friend. The consideration of further costs is reserved—and of all further directions, if necessary ; and all parties will have leave to apply as there may be occasion.

subject, upon more than one occasion, and re-considered with much anxiety my own decision, opposed as I find it to be to their opinions, I am now to state the conclusions arrived at by me.

I announced at the hearing, my concurrence with their Honors, that the administrator should be relieved from the payment of any costs; and I unreservedly agree, on considering the authorities, that he ought not to be exposed to the censure which such a direction implies, without a graver amount of irregularity than it was my intention to impute to him.

On the other hand, I cannot assent to the judgment of my colleagues, as I understand the matter, on the other portions of the case. The costs of the annuitant and her trustee, I think, should be paid out of the estate, because she was brought into the suit with claims unsatisfied (so far as the Court has any means of ascertaining), and certainly unsecured; while the administrator, whose duty it was to retain the whole estate for her protection, had taken a mortgage on it from one of the reversioners, to secure the repayment of moneys which—however kind the motive as it respects that individual—never ought to have been advanced. I was, and am of opinion, therefore, that the instrument itself in the administrator's hands cannot be respected; so as, in any degree, to interfere with that annuitant's rightful claims.

As to the administrator's claim to *receive* costs, both my colleagues are so clearly of opinion in his favour, that I must presume them to be right. I regret, however, my inability to agree with them. It is certain that he rendered accounts before the filing of the bill, and that those accounts have not been falsified. And I am quite willing to assume, nor do I for a moment doubt, that he has paid to the absent reversioners all the sums alleged to have been so paid. But they had no right, while the annuitant remained unsatisfied, to receive a shilling—much less to be paid in excess of their shares. And the result is seen, in the eventual inadequacy of the real estate, to pay her annuity. It is urged, that the administrator did in effect set apart a fund, sufficient to

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

satisfy that claim. In other words, as it would seem (for really there is no evidence of this), he retained a sum in his own hands for that purpose; paying the annuitant regularly interest on it, and at a high rate—sometimes, moreover, in advance—up to the commencement of the suit. But, however honourable the administrator's conduct in this respect, I cannot regard it as affecting the principle of my decision. And I still think that he inflicted an injury on the estate, without reasonable excuse, by putting forward his own unauthorised security in obstruction of the arrangement, so beneficial at the time to all other parties interested, proposed in December 1862. These things being considered, I retain my opinion that the administrator ought not to receive, though yielding to the conclusion that he ought not to pay costs.

I may add, that, whereas the infant reversioners pray for a partition—to which they would be entitled if the annuity were provided for—this their object is defeated, by the administrator's acts or omissions indicated. And yet, as urged by Mr. *Gordon*, the administrator's costs, if allowed him in this suit, will have to be paid out of the shares of those infants only.

The question as to the disposal of the real estate, in order to produce the highest rental, for the protection at once of the annuitant, and finally the reversioners, and without an unnecessary further reference to the Master, was I conceive satisfactorily and efficiently disposed of in my judgment. An uncertain tenure will not induce a high rental; and the plan proposed, while it secures some certainty to a lessee, will leave the property open for division after a certain term, in case of the annuitant's death during the extended term. This will afford the best chance, it appears to me, for avoiding a deficiency. But should there be one, I apprehend clearly that these plaintiffs cannot be made to contribute, in all fairness, more than one moiety of it. The other two-fourths, then, should be paid personally by the administrator; since, by his own act, there are no other funds out of which it can now be met.

I am of opinion, that—on the footing of this judgment,

which however is not that of the Court—each party should bear his own costs of the appeal. But, as my brethren are wholly with the appellant, he will of course receive his costs out of the estate—and so, I presume, must the respondents.

1866.
O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

HARGRAVE, J. This Court having unanimously decided at the hearing of this appeal that the decree of the Primary Judge is to be amended by omitting the directions that the administrator should pay the costs of any party to this suit, only two questions have remained for our consideration, viz. :—First, whether the administrator should receive his costs of the suit to the present time; and, secondly, whether any step could be taken beneficially to the plaintiffs, and also consistently with the equities of the several parties, with a view to the leasing, partition, or sale of the testator's real estate; one-half of which belongs to the infant plaintiffs, subject to the annuity.

With regard to the first point, viz., the right of the administrator to receive his costs of this suit, the English rule upon this point seems to me to be too clear for any argument, and is, moreover, founded on reasons so strong as not to admit of any hesitation on my part to adopt the English rule, unless this Court is prepared to overrule such leading cases as *Heighington v. Grant* (a), before Lord Chancellor Cottenham, in 1844; *Stevens v. Pillen* (b), before Sir James Wigram, V.C., in 1848; *Noble v. Meymott* (c), and *Royds v. Royds* (d), before Sir John Romilly, M.R., in 1851; *Knott v. Cotter* (e), and *Cotton v. Clark* (f), before the same learned Judge, in 1852. So also the still more recent cases of *Robison v. Kelly* (g), *White v. Gudgeon* (h), and *Hyatt v. Hyatt* (i), all in 1862; and the two cases of *Randfield v. Randfield* (k), and *Wettenhall v. Davis* (l), both in 1863, are all in favour of the appellant.

- (a) 1 Phillips 600.
- (c) 14 Beav. 471.
- (e) 16 Beav. 77.
- (g) 30 Beav. 520.
- (i) 30 Beav. 630.

- (b) 12 Jur. 282.
- (d) 14 Beav. 54.
- (f) 16 Beav. 134.
- (h) 30 Beav. 545.
- (k) 9 Jur. N. S. 842.

- (l) 9 Jur. N. S. 1216.

1866.
O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

Lastly, in *Birks v. Micklethwaite* (a), Lord Chancellor *Westbury* said: Nothing ought to be "adhered to more sacredly than the general principle that trustees or executors must have their costs;" without this protection "it will be impossible, as the Judges have frequently said, to get intelligent, competent, and responsible persons to act as trustees." Upon this first point, therefore, it is plain to my mind that the administrator must receive out of the personal estate all his costs of suit, and as between solicitor and client, before any other party receives any costs.

It has indeed been suggested that the facts—first, that the administrator became a mortgagee of the share of one of the adult defendants; and secondly, that he has successfully resisted some application for a lease of the real estate, ought to deprive him of his costs. But as to the first circumstance, viz., that the administrator has taken before suit a valid and *bona fide* mortgage from one of the two adult defendants of his one-fourth of the residue before his going out of the jurisdiction, as this mortgage was to recoup the administrator his advances made to the mortgagor, it is a perfectly unimpeachable transaction, just as if such security were in the hands of a third party, but, of course, such mortgage was taken by the administrator as subject to the prior charge of the annuity. As to the second circumstance that he, being a litigant, has resisted any proceedings in the Master's Office which might damage his security, it certainly would be a most novel argument for this Court to consider any such lawful defence by a litigant of his *bona fide* security as affecting in the least his right to his costs of suit. The Court has never yet visited any litigants with the loss of their costs of suit, because they fail in opposing any collateral proceeding, still less can they be thus punished because such opposition has been successful.

Upon this part of the case I think that, according to the long established rules and practice in Equity, this administrator is entitled to his costs of suit, including his

(a) 34 L. J. Ch. 364.

costs of this appeal, out of the personal estate, before any other party receives any costs; and as the plaintiffs have brought him here to pass his accounts as administrator in a most useless but expensive litigation, I cannot understand why, if the fund should be deficient, either two-fourths, or any other deficiency in the personal estate, should be thrown upon this administrator, merely because the two other parties interested in the estate are made formal defendants, and have long since received their shares, being perfectly satisfied with their administrator's conduct, and without any litigation; and also, be it remembered, without the other parties making those grave and unfounded accusations against Mr. *Johnson's* character as the administrator of this estate, which accusations are only now at last unreservedly withdrawn as having been altogether groundless from the very beginning.

With regard to the costs of the other parties, and especially the annuitant's costs and the separate costs of her trustee, the usual practice has been only to allow one set of costs to two co-defendants being assignor and assignee of a defendant's interest in a fund in Court; unless there be some special reason for such persons being entitled to two sets of costs out of the estate, as both necessary defendants and rightly severing in their defences; but I confess I can discover no ground in the perusal of the case for a double set of costs being thus charged against the estate of these infants in respect of this annuitant and of her trustee only. I am also of opinion that such costs ought to be paid *pari passu* with the plaintiff's costs of suit; and if the personal estate should be found insufficient for all such *pari passu* costs, the plaintiff's own costs must, I think, be applied in payment of the annuitant's unsatisfied costs; and all these unsatisfied costs must be reserved until further directions have been carried out as to the real estate.

With regard to any lease, sale, or partition of the real estate, I do not see how the Court can take into its hands, without any reference to the Master, to make

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

final directions to deal conclusively with the infants' estate in the manner proposed by the decree under consideration, and in truth, without any facts regularly or even informally before the Court.

All that can now be directed is the usual reference to the Master, to inquire what is best to be done with the real estate for the benefit of the annuitant and all parties interested ; and if the plaintiff's next friend has any real regard for the interests of the infants, ostensibly under his care, there will be no real difficulty in proceeding rapidly and successfully with this special direction, so that the real estate may be duly administered according to the circumstances of this most unfortunate and unnecessary suit.

FAUCETT, J. The principal question in this case is, whether the administrator should receive his costs out of the estate or not.

At a period when, according to the evidence, no other person could be procured to undertake the trouble of managing the estate, the administrator, at the urgent request of the parties interested, took upon himself the task of administering it. For many years he has received large sums of money belonging to the estate ; and, being called upon before the commencement of the suit to furnish accounts, he furnished debtor and creditor accounts which have in no way been falsified. In one trifling instance only there was an error ; which, it is admitted, was unintentional, and was corrected by the administrator himself. He retained in his own hands, however, a considerable sum of money, to meet the payment of the annuity and other charges connected with the estate—instead of investing it on security. Out of the funds that came into his hands, he has paid the annuitant from time to time her annuity ; or, rather, he has charged himself with interest on the sum he retained, and paid the annuity out of that interest. He also appears to have paid the children from time to time sums of money, which he seems to have considered as an overplus, after retaining sufficient for the payment of the annuity, and

which might have been paid as portions of the shares to which they were entitled under the will.

It is not suggested, as I understand, that the administrator has acted in reference to the administration in any way with a view to his own benefit; and it appears to me, from the evidence, that the moneys which he has paid, and the advances which he may have made from time to time, were so paid and made solely with a view to the interests of the parties who were entitled under the will. Under these circumstances, the administrator has been charged compound interest on all the moneys that have come into his hands as administrator; and I do not think that he ought, in addition, to be compelled to pay his own costs of this suit. If, in addition to the trouble which as administrator he has had, he should have to pay his own costs, it would be difficult to get honest and responsible men to undertake such duties.

It is said, however, that the administrator has taken, for moneys advanced by him, a mortgage over the share of the real estate to which one of the children may be entitled; and that he has used his rights under this mortgage, so as to prevent a beneficial disposal of the estate—and that, for any portion of the suit, or of delay in it caused by that, he ought not to get his costs. I confess that I felt some difficulty on this point. But, as regards that mortgage, I think he is, with respect to the annuitant and the other parties, interested in the position of the mortgagor; and I am not satisfied that he has done anything that the mortgagor might not have done. But I entirely agree with the Chief Justice, that the mortgage cannot be allowed in any way to interfere with the payment of the annuity. The annuity is the first charge on the real as well as the personal estate; and if the children, either by mismanagement or miscalculation, or from misplaced kindness, have had advances made to them which have rendered the personal estate insufficient to pay the annuity, the deficiency must be made up out of the real estate. And I see no reason to suppose that it will be insufficient for this purpose.

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

1866.

O'FERRALL
and others
v.
The
ATTORNEY
GENERAL
and others.

On the whole, as the administrator has not been charged with fraud, or any misconduct approaching to fraud, and as the accounts which he furnished before the suit have not been falsified, and as the error of making advances appears to me to have arisen from a desire to promote the interests of the children, without intending or expecting to prejudice the annuitant, and further, as he has been charged compound interest on all the moneys that have come into his hands belonging to the estate, and considering also the circumstances under which he took upon himself the administration, I do not think that the Court ought to go farther, and prevent him from getting his costs. I am of opinion, therefore, that he ought to get his costs out of the estate.

With respect to the disposal of the real estate, I understand that this matter has not been reported on by the Master. If so, as he is the proper person to consider what is the best mode of disposing of it, I think that it ought to be referred to him to consider that question—(I do not mean necessarily selling)—having regard in the first place to the interests of the annuitant, and then to the interest of the other parties concerned.

ERRATUM.

PAGE 31 (Equity), last line but one—omit the words “The paper has, of course, been submitted to my learned colleagues,” and change the full stop at “access” into a semicolon.

AN INDEX

TO THE

PRINCIPAL MATTERS IN THE CASES

AT COMMON LAW.

ABANDONMENT OF JUDGE'S ORDER.

See PRACTICE, 2. *Fanning v. Simmons* 224

ABSCONDING FROM SERVICE.

See MASTERS AND SERVANTS ACT, 1. Ex parte *Monson* 256

ACCOMMODATION BILLS OR NOTES.

See PROMISSORY NOTE, 1. *Ickerson v. Hayes* 158

AGREEMENT. 1. In an action by A. against B., on an agreement in the words following.—“On the assumption that the deed of assignment executed by you to us this day, contains a true and correct statement of your debts and liabilities, we hereby undertake, on the execution thereof by a majority of the creditors named in such deed, and on the same being duly registered according to the requirements of the 5 Vic., No. 9, to pay to you the sum of £200, in addition to the sum of £45 belonging to your estate now in your possession”—*Held*, on demurrer, that the agreement disclosed no consideration for the promise. *Alexander v. Bensusan* and another 314

2. The first count set out a contract, dated 17th November, 1864, to deliver 2500 cattle between the 1st February and 1st April, 1865, at a certain price and place. There having been only a partial delivery and payment, the second count alleged an agreement by the defendant to pay all damages for his breach (including the difference in price between the defendant's agreed price and an *increased* price which the plaintiffs would have obtained by re-sale to B.), and to deliver the remainder of the cattle at the former price, but in an extended time and at a different place.

Plea to the second count, after setting out the agreement of 17th November, 1864, as declared on in the first count, stated that the contract sued on in the second count was as follows:—“April 28, 1865 I (the defendant) have this day received from D. and S. O'S. (the plaintiffs) £735, and their acceptance at six months for the like sum, in payment for 784 cattle delivered to them this day, being part of the number of 2500 cattle sold to them as per contract of 17th November, which said number of 2500 were to be delivered on 1st April last. The Messrs. D. and S.O'S., in taking delivery of the present number, 784, I acknowledge, have not in any way prejudiced their right to any action, &c., for breach of contract. I now promise, &c., to fulfil the remainder of that contract within one month from this date, by delivering 1716 cattle, according to the contract of 17th November, at C. (a different place from that named in the former contract), and hereby certify that I will indemnify the said D. and S. O'S. for any loss or consequence that may accrue to them through my breach of contract, through cattle being delayed in delivery to B. I make myself liable for the difference of price paid by D. and S. O'S. to me, and that paid by B. to them.” *Held*, on demurrer to the plea, that no consideration moving from the plaintiffs appeared for the second contract; and that the defendant was entitled to judgment. *O'Sullivan* and another v. *Aarons*. 353

3. The declaration stated an agreement for a purchase of land between the plaintiff and defendant to have been as follows:—That the defendant should pay £2000 cash down, and the remainder (the whole price being £3250) at such times as should be mutually agreed upon, not to exceed

two years, with interest; and that the plaintiff should give a clear marketable title to the property. Averment, that although the plaintiff was always ready to perform the agreement, the defendant—before a reasonable time had elapsed for performance of any part of it by the plaintiff, and before any breach by him—wholly refused to perform his own portion, and then discharged the plaintiff from the performance of his part of the agreement and from all readiness to perform it.

The defendant pleaded to this allegation of refusal by him (repeating the words of the declaration as to the lapse of time and the denial of any previous breach by the plaintiff), that he did not, before a reasonable time had elapsed for its performance by the plaintiff, or before any breach by him, refuse to perform his own part of the agreement. *Held* bad on demurrer.

The defendant also pleaded to the allegation of refusal (but without referring to the allegation as to time, or the denial of any breach by the plaintiff), that the plaintiff did not give or tender to the defendant a clear marketable title, and that the performance of those acts was never waived by the defendant. *Held*, on demurrer, bad. *Hibburd v. Warden* 192

AMENDMENT AT NISI PRIUS.

See PARTNERSHIP, 2. *Morehead* and another v. *McIsaacs* and another 295

AMENDMENT OF CONVICTION on motion for prohibition. Ex parte *Salmon* 397

See SALE OF LIQUORS LICENSING ACT (25 Vic. No. 14), 1.

ARSON. 1. A tent, which is the ordinary sleeping place of the prosecutor and his family, and in which (in fact) he and they lived for many months, up to within a few days of the arson, is a dwelling-house for the purposes of arson. *R. v. Storn* 26

ASSAULT. 1. A complaint under the 9 G. IV., c. 31, s. 27, for an assault was as follows:—"personally cometh before T. B. C., Esq., one of Her Majesty's Justices of the Peace, &c., and upon his oath complaineth that J. T. and J. C." did assault "the said H. H. contrary, &c." The complaint was signed by H. H., but there was not the name of any justice subscribed to the *jurat*.

On the day of the hearing before the justices H. H. did not appear personally, but his attorney appeared, and stated that he appeared for the complainant, for the purpose of informing the justices that the matter had been abandoned, and withdrawn by notice; and J. T. and J. C. having pleaded not guilty, at their request the justices dismissed the complaint, as not having been proved. *Held*, that there was no complaint by the party aggrieved, as required by the 9 G. IV. c. 31, s. 27; and that the justices had no jurisdiction to adjudicate. Ex parte *Hawkins*. 152

ASSIGNMENT. 1. The 35th section of the 5 Vic., No. 9, provides that no deed of assignment shall be valid, unless such deed shall have been executed by not less than four-fifths in number and in value of the creditors of the assignor; but that where any deed shall be so executed, its provisions shall be binding on all creditors named in the schedule, whether assenting or not. *Held*, that in respect of outstanding bills, the creditor at the time of the execution of the deed is the then holder.

Where the execution of a deed of assignment by A., a creditor of the assignor, was a nullity, it was held that it could not be made good as against B., a non-executing creditor, by a deed of confirmation executed by A. after action brought by B. *Beauchamp v. Waller* 1

ATTACHMENT. 1. The service of an order of attachment obtained by a judgment creditor A., under the 27th section of the

- Common Law Procedure Act of 1857, against a garnishee, B., attaching debts due by B. to C., does not bind such debts as against B. and C., so that A. thereby acquires a "security or lien" within section 39 of the Insolvent Act. Where the judgment creditor had obtained such an order, and before execution issued against the garnishee, the estate of the judgment debtor was sequestered, *Held*, that, as by the sequestration the debt due by the garnishee passed to the judgment debtor's assignee, the order of attachment ought to be set aside. *Ranclaud v. Cox* 347
See PRACTICE, 6. *Ex parte Dooley* 343
- ATTORNEY. 1. The omission by an attorney who prepares a deed of assignment under the 5 Vic., No. 9, including real estate, to get the deed registered, is gross negligence; and the instrument is invalid. *In re Kirchner's Trustees* 346
- AWARD under Crown Lands Occupation Act of 1961.
See TRASPASS, 1. *Rusden v. Bagnall* 40
- BANK NOTE. 1. In an action upon certain bank notes made by the defendants, payable to bearer on demand at the defendants' office, at S., and lost before presentation, the Court (*Stephen, C.J., dissentiente*) made an order—under the 53rd section of the Common Law Procedure Act of 1857—restraining the defendants from setting up as a defence the loss of such notes, upon indemnity given. *The Australian Joint Stock Bank v. The Oriental Bank* 129
- BILL OF EXCHANGE. 1. An instrument in the following words: "At sight pay W. B., or bearer, the sum of £42 10s., for value received. (Signed), T. E. Payable at the residence of T. H. S., Church-street, Mudgee," is a bill of exchange. *Gordon and another v. Bowman* 28
- BILL OF SALE. 1. Where a bill of sale contained a power of sale upon default in the payment, on demand, of the amount payable thereunder, a demand of a larger sum than the amount justly payable does not vitiate the sale; and the mortgagor can protect himself by tendering the true sum, or, *semble*, by bringing an action against the mortgagees for demanding and selling for a larger amount. *Humphery v. Roberts* 376
- CALLS, action for *Prince v. Nowlan* 304
See COMPANY, 1 and 2.
- CERTIFICATE of dismissal, under the 9 G. IV., c. 31. *Ex parte Hawkins* 152
See ASSAULT, 1.
of title, under the Real Property Act. *Stockdale v. Hamilton and another* 180
- CERTIORARI.
See ASSAULT, 1. *Ex parte Hawkins* 152
- CHEQUE, lost, action on *Hargan v. Kennedy* 151
See BANK NOTE, 1. *The Australian Joint Stock Bank v. The Oriental Bank* 129
- COMPANY. 1. Action on behalf of a company against a shareholder, for a call covenanted to be paid under a deed of co-partnership. Plea—that the defendant was induced to join and to sign the co-partnership deed, because of and on the faith of certain false representations made to him by one J. G., an agent of the company; such agent having been employed to solicit co-operation, and procure subscribers. Averment, that within a reasonable time after notice of the fraud, and before he had received any benefit under the deed, the defendant repudiated his liabilities and abandoned his rights under the deed. *Held*, on demurrer, that the unauthorised fraud of such agent is a defence. *Prince v. Nowlan* 304
2. Action on behalf of a company against a shareholder, for a call covenanted to be paid under a deed of co-partnership. Plea—that the defendant was induced to join and to sign

the deed, because of and on the faith of certain false representations made to him by one J.G., an agent of the company; such agent having been employed to solicit co-operation, and procure subscribers. Averment, that within a reasonable time after notice of the fraud, and before he had received any benefit under the deed, the defendant repudiated his liabilities, and abandoned his rights under the deed. Replication, that before the plaintiff had any notice of such repudiation, several persons on the faith of defendant's name joined the association, and also the plaintiff and the trustees borrowed on the same ground, for the purposes of the company. Held bad, as the defendant was altogether discharged, even as to subsequent shareholders. <i>Prince v. Nowlan</i>	310
COMPLAINT for assault under the 9 G. IV., c. 31, s. 27. Ex parte <i>Hawkins</i>	152
See ASSAULT, 1.	
COMPOSITION, deed of. <i>Beauchamp v. Waller</i>	1
See ASSIGNMENT, 1.	
CONDITION PRECEDENT.	
See PLEADING, 2. <i>Hibburt v. Warden</i>	192
CONSIDERATION for promise. <i>Alexander v. Bensusan</i>	314
See AGREEMENT, 1.	
absence of. <i>O'Sullivan v. Arons</i>	353
See AGREEMENT, 2.	
effect of absence or failure of, on indorsement after maturity. <i>Ickerson v. Hayes</i>	158
See PROMISSORY NOTE, 1.	
for a guarantee. <i>Robertson v. Healy</i>	290
See GUARANTEE, 1.	
for a post-nuptial settlement. Ex parte <i>Giblin</i>	260
See SETTLEMENT, 1.	
for partnership undertaking separate liability. <i>Morehead and another v. McIsaacs and another</i>	295
See PARTNERSHIP, 1.	
CONTRACT. 1. In a contract to deliver coals on board a vessel there is an implied contract to deliver the same with care, but it is no portion of that contract to distribute them when delivered on board. <i>Brown and another v. Waratah Coal Company</i>	238
See AGREEMENT.	
CONTRIBUTORY.	
See COMPANY, 1. <i>Prince v. Nowlan</i>	304
CONVERSION OF PROPERTY of joint owners. <i>Lane and others v. Taylor and another</i>	84
See TROVER, 1.	
CONVICTION, summary, unreversed, is answer to action for false imprisonment. <i>Armstrong v. Fuller</i>	269
See FALSE IMPRISONMENT, 1.	
CORPORATION.	
See MUNICIPALITY, 1. <i>The Municipality of Cook v. St. Paul's College</i>	322
COSTS. 1. Where no principle or very large sum is involved, and the question is within the discretion of the Judge, the Court will not entertain a motion for reviewing the decision of the Judge as to costs, although such discretion has been wrongly exercised. <i>Fanning and another v. Simmons</i>	224
See PRACTICE, 2.	
2. Notice to admit not having been given, costs of proving documents not allowed in the absence of the Judge's certificate under the 92nd section of the Common Law Procedure Act. <i>Levy v. Smith</i>	400
CRIMINAL LAW.	
See ARSON.	
See DYING DECLARATION.	
See FALSE PRETENCES.	

INDEX TO CASES AT LAW.

v

See FRAUDULENT INSOLVENCY.

See MURDER.

See PERJURY.

CRIMINAL PLEADING.

See LARCENY, 1. *R. v. Wilson* 15

See FRAUDULENT INSOLVENCY, 5. *R. v. Curtis* 340

CROWN DEBT. 1. A. being sued upon an administration bond executed by him under the 4 G. IV., c. 96, s. 15, sequestrated his estate. The sequestration took place after action brought, and before judgment obtained; but no notice of the action was given to the official assignee of A.'s estate, nor was he "summoned to take up and defend the action" under section 31 of the Insolvent Act. The action went on, and judgment was obtained as on a bond to the Crown. An application having been made in the name of the Attorney-General, the nominal plaintiff in the action, to prove in the estate for the full amount of the judgment, was refused by the Chief Commissioner. *Held*, on appeal that such refusal was right. *In re Buckland's Insolvent Estate* 244

CUSTOMS. 1. The Customs Act of 1865 enacts that, "on the importation of any goods now liable to duty, except tea, brandy, and gin, there shall be charged in addition to such duty twenty pounds for every hundred pounds thereof." *Held*, that the additional duty hereby imposed did not attach to goods already landed and warehoused under bond. *Tucker and another v. Duncan* 198

DAM, erection of, by riparian proprietor across a running stream is unlawful, if flow of entire stream obstructed. *Pring v. Marina* 390

DAMAGES. 1. Land under mortgage to A. was leased to B. B. mortgaged the lease to the plaintiff for £525. Afterwards, by deed, B. assigned the lease to the defendant (the plaintiff joining in the conveyance), in consideration of the payment by the defendant of £553 to the plaintiff, and of £247 to B.; these amounts remaining unpaid, but being by the deed acknowledged to be paid. On the same day on which the assignment was executed, the defendant obtained the deeds from the plaintiff, and signed a memorandum—"I have received the deeds from T. (the plaintiff) upon loan—the deed of assignment being an escrow only, until and unless I pay him £553; and in the event of my not paying the same sum to him upon request, I hold the deeds for him, and will return them to him." The plaintiff having obtained the deeds from the defendant, caused the deed of assignment to be registered, and afterwards lent them to the defendant to raise money upon them. The latter having, subsequently, paid £200 to the plaintiff, refused to return the deeds to the plaintiff, unless that amount was repaid. The plaintiff sued the defendant for a breach of the promise to return the deeds contained in the memorandum. *Held*, that he was entitled to recover substantial damages. *Thurlow v. Scotland* 316

DEBT. 1. A promise by an uncertificated insolvent to pay a debt provable against his estate creates a new debt; and an action will lie for such new debt before certificate obtained. *Miller v. Keogh* 210

DEEDS, measure of damages for detention of deeds. *Thurlow v. Scotland* 316

See DAMAGES, 1.

DELIVER, contract to. *Brown and another v. Waratah Coal Company* 238

See CONTRACT, 1.

DESERTED WIVES ACT, protection order under *Clark v. Hart* 252

See FEME COVERT, 1.

DESERTION, property acquired by *feme covert* after. *Clark v. Hart* 252

See FEME COVERT, 1.

DETENTION OF DEEDS, measure of damages for. <i>Thurlow v. Scotland</i>	316
See DAMAGES, 1.	
DEVISE is void against testator's unpaid creditors of every degree, and land of which testator died seized remains vested in the heir for their benefit. <i>Maclean v. Dight</i>	95
See SHERIFF, 1.	
DISTRICT COURT. 1. The defendant was a contractor for building a bridge at A., where he had slept for three or four months; but he ordinarily lived in S. <i>Held</i> , that he was not resident at A. within the meaning of the fourth section of the District Courts Act. <i>Ex parte Bailie</i>	17
See PRACTICE, 1.	
DUPLICITY in information. <i>R. v. Curtis</i>	340
See FRAUDULENT INSOLVENCY, 5.	
DYING DECLARATION. 1. Declaration by a man who states his belief that he is dying, and causes prayers for the dying to be read for him, and who is then in fact dangerously ill, is receivable as a dying declaration, although he at the time, or shortly before, had sent for a medical practitioner to attend him. <i>R. v. Sam Poo</i>	25
ENDORSEMENT on lien on wool. <i>Cheesbrough v. Thomson and others</i>	366
See LIEN ON WOOL, 1.	
EQUITABLE PLEA.	
See TRESPASS, 1. <i>Rusden v. Bagnall</i>	40
See SCHOOL OF ARTS, 1. <i>Stenhouse and another v. Hardie and another</i>	359
EVIDENCE. 1. Under the third section of the Insolvency Amending Act of 1855, 19 Vic., No. 33, no statement made by an insolvent on his examination in the Insolvent Court is admissible in evidence against him, on the trial of any indictment other than an indictment for perjury. <i>R. v. Harris</i>	66
See FRAUDULENT INSOLVENCY, 2.	
2. In an action for a case of birds sold by the plaintiff to the defendant, the plaintiff's day-book, containing an entry of the sale in question, was put in evidence by the plaintiff, as part of his case, the defendant's counsel not objecting, and then evidence was given by the defendant questioning the fact of the entries being contemporaneous with the alleged sale; and the Judge allowed evidence to be given in reply, that a particular entry in plaintiff's day-book, viz., of a sale of birds to one W. was correct. <i>Held</i> , that although evidence in reply was properly admitted, the evidence of this specific transaction with W. was altogether inadmissible.	
The case in question was alleged to have been sold by the plaintiff in his shop to the defendant, personally, on the 13th October, and delivered in the same shop to the defendant on the 14th. Two witnesses for the defendant stated that the defendant was confined to his house on both days, except that one of the witnesses admitted that he went out during the evening of the 13th. The Judge told the jury that the evidence of these witnesses might more properly be termed circumstantial. <i>Held</i> , that, although such direction was inaccurate, it was not sufficient ground for granting a new trial. <i>Palmer v. Whitfield</i>	219
proof of sequestration. <i>R. v. Hughes</i>	71
See FRAUDULENT INSOLVENCY, 3.	
of account at bank. <i>R. v. Shield</i>	213
See FALSE PRETENCES, 2.	
of account at bank. <i>R. v. Dawson</i>	33
See FALSE PRETENCES, 1.	
in reply. <i>Palmer v. Whitfield</i>	219
See DYING DECLARATION, 1. <i>R. v. Sam Poo</i>	25
EXECUTION against one partner, illegal sale of partnership property is. <i>Lane and others v. Taylor and another</i>	84

- EXTINGUISHMENT** of debt by agreement. *Morehead* and another v. *McIsaac* and another 295
See **PARTNERSHIP**, 2.
- FALSE IMPRISONMENT.** 1. By section 7 of the Vagrant Act, any person may apprehend any person "who shall be found offending against the Act," and deliver him to a constable, to be taken before a justice who may convict in a summary way. The defendant arrested the plaintiff and gave her in charge to a constable. The plaintiff was taken by the constable before a justice, and having been charged, under section 3 of the same Act, with being a rogue and a vagabond, by having been found in the defendant's dwelling-house for an unlawful purpose, was convicted of such offence in a summary way. The plaintiff having sued the defendant for such arrest, *Held*, that, even assuming that the conviction was wrong in form and substance, and that there was no offence whatever committed against section 3 of the statute, the conviction being unreversed was a complete answer to the action. *Armstrong v. Fuller* 269
- FALSE PRETENCES.** 1. The prisoner was charged with falsely pretending that a cheque drawn by him was good, and that he had sent £500 down to the Oriental Bank to meet it. At the trial, the evidence was only that of the accountant of the bank, who had no knowledge of the facts, except as derived from the bank books, it not being his business to receive moneys. The cheque was not shown to have been presented. *Held*, that the evidence was defective, and the conviction was quashed. *R. v. Dawson* 33
2. Upon an information for obtaining money by false pretences, by means of a cheque signed by the prisoner, it is sufficient to call the bank accountant to prove that the prisoner kept no account at the bank in which the cheque was drawn, and that no money was paid in there to his credit, during the preceding four months, without producing the books or calling the teller. *R. v. Shield* 213
3. The prisoner obtained, by false pretences, from the steward of a club, money of which he was in charge, and for which he was responsible and accountable to the club. *Held*, that the prisoner might be convicted of obtaining such money by false pretences, on an information laying the property in the money in the steward. *R. v. Dalrymple* 266
4. A. being charged with obtaining money by false pretences, it appeared that A., on the 27th November, had drawn and passed at Gundagai a cheque on the Oriental Bank at Yass. The jury found that A. was "guilty of drawing the cheque, but intended to have provided funds to meet it, if he had had sufficient time." The Judge refused to accept this as a verdict of not guilty, and insisted on an unambiguous verdict. The jury retired, and presently returned a verdict of guilty. *Held*, that the first finding was sufficiently ambiguous to justify the Judge in the course he pursued, and the conviction was sustained. *R. v. Shadforth* 337
- FELONS' APPREHENSION ACT.** 1. In information framed under the Felons' Apprehension Act, for giving information to the accomplice of any proclaimed outlaw, the accomplice ought to be named, or it ought to be alleged that his name is unknown. *R. v. Burford* 115
- FEME COVERT.** 1. A *feme covert*, who has obtained a Judge's order protecting personal property acquired by her after desertion, under the 22 Vic., No. 6, s. 4, is entitled to sue in respect of personal property acquired by her after such order. *Secus* in respect of personal property belonging to her husband, and left by him in her possession, and for which a demand had been made upon the defendant by the husband. *Clark v. Hart* 252

FRAUD in agent of company, answer to action against shareholder for calls. *Prince v. Nowlan* 304
See **COMPANY**, 1.

FRAUDS, STATUTE OF.

See **PARTNERSHIP**, 1. *Morehead and another v. McIsaacs and another* 295

See **GUARANTEE**, 1. *Robertson and another v. Healy* 290

FRAUDULENT INSOLVENCY. 1. A memorandum in writing, headed "Meeting of Creditors," on, &c., and in which paper the meeting in E.H.'s estate is mentioned as the second, and having the following words written in the margin thereof, "to be taken by the Registrar in insolvency," such words being initialled by the Chief Commissioner, is a good appointment and order by the Commissioner to the Registrar to hold meetings of creditors for the proof of debts in E.H.'s estate, under the 9th section of the 25 Vic., No. 1.

The Registrar having this power has power to take evidence, both orally and by affidavit, for the purpose of such proof. *R. v. Enoch Hughes* 13

2. A person who had become insolvent, intentionally omitted a horse and cart from his schedule, with intent to defraud his creditors. But he afterwards, at his second meeting, disclosed the fact of his having this property. *Held*, that he was rightly convicted of fraudulent insolvency under the 73rd section of the 5 Vic., No. 17.

Under the 3rd section of the Insolvency Amending Act of 1855, 19 Vic., No. 33, no statement made by an insolvent on his examination in the Insolvent Court is admissible in evidence against him, on the trial of any indictment other than an indictment for perjury. *R. v. Harris* 66

3. The defendant was charged, for that he "being insolvent," unlawfully, &c., with intent to defraud W.S.L. and others, the creditors of the defendant, did embezzle, retain, and remove a certain portion of his estate, &c. *Held*, that upon an information so framed, the order for sequestration of the defendant's estate, under the hand of the Chief Commissioner, was, under the 107th section of the 5 Vic., No. 17, and the 4th section of the 25 Vic., No. 8, sufficient proof of the sequestration.

Held, also, that it was not necessary to show that the creditors intended to be defrauded were creditors who had proved; but that it was sufficient to show an intent to defraud creditors generally.

The defendant had contracted to build a bridge for the Government. W.S.L. superintended the contract for him. The latter had advanced money to pay the wages of the men engaged on the contract, on condition that when the money was paid by Government on account of the contract, it should be lodged to his credit, to be expended, in the first place, in paying the men's wages then due, and the balance to be retained by W.S.L., to repay himself his advances. Two cheques having been received by the defendant from the Government, and the proceeds embezzled, *Held*, that they were properly described in the information as a portion of the defendant's estate. *R. v. Hughes* 71

4. A. was charged in the first and second count, under section 73 of the Insolvent Act, with contracting a debt fraudulently, by falsely pretending to the manager of a bank that he was possessed of certain land of the value of £5000, and that certain deeds then presented by him were the title deeds of such land, and were all free, and a perfect security for the repayment of certain sums of money which A. had asked the bank to advance. He was also charged in a third count of obtaining money by false pretences, under the 7 and 8 Geo. IV., c. 29. It appeared that in December 1864, A. applied to the manager

of the bank for a cash credit of £900, and offered to deposit as security the deeds of certain property; and the application was granted. When he deposited his deeds, and while the names of his proposed sureties were being taken down, he said the deeds were a perfect security in themselves for more than he wanted; but, the usual surety bond not having been executed, A. was allowed to overdraw to that extent—the old account current being continued. The balance against him in this matter varied—sometimes being very small, and on two occasions the balance was in his favour. About March, 1865, A. applied for a further cash credit of £400, and offered to sign a lien on the property. Before he signed it, A. stated to the manager that these properties were his and unencumbered; that all the deeds were safe and the properties quite free. The cash credit of £400 was then allowed, as before, on the faith of the deeds deposited. In fact A. had, before the application for the first cash credit, mortgaged the property to D. for £400, but this mortgage was unregistered; and he had also made a voluntary settlement of the same property, which was registered. The jury having convicted A. on the three counts, finding specially that A. made a false representation both with regard to the mortgage to D. and also the settlement, and contracted a debt thereby, the Court set aside the verdict on the third count, but sustained the verdict on the first and second counts. *R. v. Britcher* 121

5. An information framed under the 73rd section of the Insolvent Act, which charged in the same count that the prisoner did 'embezzle, conceal, retain, and remove' certain moneys, &c., is not bad for duplicity, as charging two or more distinct offences. *R. v. Curtis* 340

GARNISHEE.

See ATTACHMENT, 1. *Ranclaud v. Cox* 347

GRANT, LOST.

See NUISANCE, 1. *Vickery v. Marr* 202

See PLEADING, 1. *Municipality of Waterloo v. Hinchcliffe* 273

GRANT OF EASEMENT in gross. *Municipality of Waterloo v. Hinchcliffe* 273

GUARANTEE. 1. Declaration on a guarantee in the following terms, given by the defendant to the plaintiffs:—"Gentlemen, I hereby hold myself responsible for McC., for any liabilities he has or may have with your firm, in connection with his telegraphic contract with the New South Wales Government, for the line between D. and the S. A. boundary." Averment, that relying on the promise of the defendant, the plaintiffs made further advances to McC. of money and goods. Breach, non-payment by McC. or the defendant, for such further advances. *Held*, on demurrer, good. *Robertson and another v. Healy* 290

IMPORTATION, meaning of, in Customs Act. *Tucker v. Duncan* 198

INCLOSED LANDS ACT (18 Vic., No. 27).

See JUSTICES, 2. *Ex parte Desmond* 387

INCORPORATION, petition for. *Municipality of Cook v. St. Paul's College* 322

INDEMNITY being given, the defence of loss of notes restrained. *Australian Joint Stock Bank v. The Oriental Bank* 129

INDORSEMENT after maturity of promissory note. *Ickerson v. Hayes* 158

See PROMISSORY NOTE, 1.

of promissory note by one to whom it has not been transferred, will not make indorser liable on indorsement. *Williams v. Burley* 206

INSOLVENCY, FRAUDULENT.

See FRAUDULENT INSOLVENCY, 1. *R. v. Enoch Hughes* 13

" " " 2. *R. v. Harris* 66

" " " 3. *R. v. Hughes* 71

See FRAUDULENT INSOLVENCY, 4.	<i>R. v. Britcher</i>	121
INSOLVENT, " " " " 5.	<i>R. v. Curtis</i>	340
INSOLVENT, promise by uncertificated, to pay debt proveable against his estate, creates a new debt recoverable by action.		
	<i>Miller v. Keogh</i>	210
INSOLVENT ACT, proof of Crown judgment debt under.	<i>In re Buckland's Estate</i>	244
order of attachment is not "security or lien" within s. 39 of.	<i>Ranclaud v. Cox</i>	347
under section 7 of, principles regulating summary application to set aside voluntary settlement.	<i>Ex parte Giblin</i>	260
See SETTLEMENT, 1.		
JOINT ACTION by partners.	<i>Lane v. Taylor</i>	84
See TROVER, 1.		
JURISDICTION, summary, of justices ousted by the bona fide assertion of a claim of right.	<i>Ex parte Desmond</i>	387
See JUSTICES, 1.	<i>Ex parte Green</i>	110
JUSTICES. 1. Summary jurisdiction was conferred on two justices: three justices adjudicated, of whom two only heard the evidence. Held, that since all the three concurred in the adjudication, the third justice did not invalidate the decision of the other two.	<i>Ex parte Green</i>	110
2. The bona fide assertion of a claim of right, whether well or ill founded, if only it be honestly made, ousts the justices of all jurisdiction to convict upon an information under the 18 Vic. No. 27, for entering into enclosed lands without lawful excuse.	<i>Ex parte Desmond</i>	387
See ASSAULT, 1.	<i>Ex parte Hawkins</i>	152
LARCENY. 1. The prisoner was charged with stealing a one pound note, the property of C.H. The note was taken with a letter in which it had been put by C.H., from the Braidwood post-office, where C.H. was the postmaster. But C.H. deposed that he placed the note and letter in the box for the purpose only of testing the honesty of the prisoner, and that the address of the letter was wholly fictitious. He added that it was not his intention to send the letter. Held, the property in the note was rightly laid in C.H.	<i>R. v. Wilson</i>	15
LIEN ON WOOL. 1. H. and T., being partners, were lienees of certain wool of the plaintiff. After the dissolution of the partnership, T. endorsed the lien to M. and B., to whom H. and T. were largely indebted for advances made to the firm. Held (<i>Hargrave dubitante</i>), that the endorsement was good, although made by one of the partners after the dissolution, being for the disposal of previously existing property of the firm, and for the paying off of part of their previously existing liabilities.		
The endorsement on the lien was as follows:—"Deliver the within wool to M. and B." Held valid and sufficient in point of form to pass the property in the wool to the assignees.	<i>Cheesbrough v. Thomson and others</i>	366
LOST GRANT, plea of		
See NUISANCE, 1.	<i>Vickery v. Marr</i>	202
See PLEADING, 1.	<i>Municipality of Waterloo v. Hinchcliffe</i>	273
LOST NEGOTIABLE INSTRUMENTS, action on.	<i>Australian Joint Stock Bank v. The Oriental Bank</i>	129
See BANK NOTE, 1.		
MASTERS AND SERVANTS ACT. 1. A servant charged with unlawfully absconding from the hired service of his master without reasonable cause before the expiration of the term of his agreement, cannot be sentenced to imprisonment under the second section of the Masters and Servants Act.		
On motions for prohibitions, affidavits of what occurred before the justices are not admissible to supplement the depositions, but they may be used for the purpose of shewing merits.		

- A party who has served a Judge's order on the other side with a notice that he intends to appeal, does not waive his right to move to rescind such order. *Ex parte Monson* 256
- MORTGAGE OF GOODS.**
See *BILL OF SALE*, 1. *Humphery v. Roberts* 376
- MUNICIPALITY.** 1. A proclamation constituting a municipality, under the Municipalities Act of 1858, is not invalid because in its definition of boundaries it omits a substantial portion of the land included in the petition for incorporation. *The Municipality of Cook v. St. Paul's College* 322
See *PLEADING*, 1. *Municipality of Waterloo v. Hinchcliffe* 273
- MURDER.** 1. Where a constable, in lawful charge of a number of prisoners, is killed by one of them, in the prosecution of a common design to escape at all hazards, it is murder. *R. v. Crookwell* 119
- NECESSITY**, way of. *Gibson v. M'George* 44
- NEGLIGENCE** by attorney in preparing deed of assignment. *In re Kirchner's Trustees* 346
- NOTICE TO ADMIT.**
See *COSTS*, 2. *Lery v. Smith* 400
- NUISANCE.** 1. In an action for nuisance, by discharging fouled water and filth over the plaintiff's land, the defendant justified, under a lost grant by S. T., the then owner of the plaintiff's land, to the then owners of the defendant's land, so to discharge. The plea, after stating the conveyance "to the said then owners of the said adjoining land, and to their heirs and assigns of the right for themselves their tenants and servants of, &c.," continued, "and by virtue of the said grant the defendant, at the times, &c., as and being tenant for life of the said adjoining land, was entitled to the right of," &c. Averment, that the grievances were user by the defendant of the said right. *Held*, on demurrer, that the plea was bad, as not stating the derivative title of the defendant from the grantee under S. T. *Vickery v. Marr* 202
by overflow of water, whereby plaintiffs' culverts were injured. *Municipality of Waterloo v. Hinchcliffe* 273
See *PLEADING*, 1.
- PARTNERSHIP.** 1. In a case in which there were eight plaintiffs, it appeared that the plaintiffs and the defendant put into a common fund £180 (£20 a-piece), out of which it was agreed that the defendant should receive 100 guineas for his trouble, in examining and reporting upon a quartz reef, and 50 guineas for his expenses. If the report was favourable, the plaintiffs, the defendant, and A. were to work the reef in partnership. The defendant received the 150 guineas, but neither made a report nor inspected the mine. *Held*, that the plaintiffs, being joint contributors with the defendant, could not sue him to recover back the 50 guineas, or any part thereof. *Harbottle v. Hargraves* 104
2. In an action against M. and N., who were partners, for coals sold and delivered, M. allowed judgment to go by default, and N. pleaded the general issue. At the trial, it appeared that M. was indebted to the plaintiffs for coals sold, &c., before the partnership with N. After the evidence on both sides was closed, the Judge allowed a special count to be added, which alleged that M. and N. jointly contracted to pay the debt of M. to the plaintiffs, in consideration that the plaintiffs would continue to sell coals and deliver them to M. and N.; and he permitted the defendant to plead the Statute of Frauds. The jury having found for the plaintiff on the special count, *Held*, that the Statute of Frauds was no answer to the contract alleged in that count.
Held also, that by such contract the debt of M. was, as a matter of law, extinguished.
Held also, that the count was good, and disclosed a sufficient consideration for the contract.

Held, that the amendment was properly made, and that the terms on which it was allowed by the Judge ought not to be reviewed.

Held also, that even if the count was bad for not alleging that the debt of M. was agreed to be extinguished, the objection ought not to prevail, as it had not been taken at the trial. *Morehead* and another v. *McIsaacs* and another 295
See LIEN ON WOOL, 1. *Cheesbrough v. Thomson* and others [386

See TROVER, 1. *Lane v. Taylor* 84

PERJURY. 1. Information before two justices, under the Inclosed Lands Trespass Act of 1854, the 18 Vic., No. 27, against A.'s son, who set up as his excuse for the alleged trespass, that he did it by the authority of A., who claimed the property. He then called A. as a witness, who swore that he had a claim to the land, when in fact he had no such claim. On this the justices dismissed, or the prosecutor withdrew the case. *Held* (*Hargrave, J., dissentiente*) that A. could not be convicted of perjury in that he had so sworn. *R. v. Armstrong* 36

PETITION OF INCORPORATION.

See MUNICIPALITY, 1. *The Municipality of Cook v. St. Paul's College* 322

PLEA of lost grant. *Vickery v. Marr* 202
of fraud to action for call. *Prince v. Novelan* 304

PLEADING. 1. The first count of the declaration stated that the defendant was possessed of a woolwashing establishment, near to a watercourse and certain roads and lands of the plaintiffs; and that the defendant kept his premises so insufficiently and improperly constructed, and in such a bad state of repair, and so negligently and improperly used them, that he caused great quantities of water to overflow therefrom, over the plaintiffs' said roads and lands, and into the said watercourse—whereby sundry culverts and bridges on it were broken, and the roads and lands became torn up and otherwise damaged.

The second count charged that the defendant wrongfully caused a large overflow of water from his premises, in and upon the watercourses, roads, and lands of the plaintiffs; whereby the culverts and bridges were broken, and the roads and lands torn up.

Plea, that the watercourses, roads, and lands, at the time of the acts complained of, were the soil and freehold of Sir D. C. and T. B.; and that the defendant did the acts by their permission. *Held*, on demurrer, bad.

Another plea set up a lost deed, whereby the then owner in fee of the watercourses, roads, and lands (not named) granted to the then owner in fee of the woolwashing establishment, whose estate the said Sir D. C. and T. B. had at the time of the grievances, and to his heirs and assigns, the right—for themselves and their tenants—of discharging "surplus" water from those premises, for their more convenient use and occupation, over and into the said roads, lands, and watercourses. The plea then alleged that Sir D. C. and T. B., being seised of the establishment, demised it by deed, together with all rights under the said grant, to T. H. and his assigns; and that the defendant, being the latter's tenant, committed the grievances in the exercise of the aforesaid right. *Held*, on demurrer, a good answer to the second, but not to the first count.

Another plea stated, that before the plaintiffs had any interest in the watercourses, roads, and lands, or any of them, Sir D. C. and T. B. were seised in fee of the woolwashing establishment, and also of those lands, and the land on which the said roads and watercourses have since been constructed, and also of a dam adjoining; and that, being so seised, the said Sir D. C. and T. B. demised the said establishment and dam to T. H. and his assigns, for a term still unexpired, with

the right to discharge "surplus" water from the premises, for their more convenient use and occupation, upon and over the aforesaid lands—now of the plaintiffs. The plea then stated that T. H., by deed, assigned the term, together with that right, to the defendant, who accordingly discharged the surplus water as he lawfully might. *Held*, on demurrer, no answer to the first count, but a good plea to the second. *The Municipality of Waterloo v. Hinchcliffe*. 273

2. The declaration stated an agreement for a purchase of land between the plaintiff and defendant to have been as follows:—That the defendant should pay £2000 cash down, and the remainder (the whole price being £3250) at such times as should be mutually agreed upon, not to exceed two years, with interest; and that the plaintiff should give a clear marketable title to the property. A verment, that although the plaintiff was always ready to perform the agreement, the defendant—before a reasonable time had elapsed for performance of any part of it by the plaintiff, and before any breach by him—wholly refused to perform his own portion, and then discharged the plaintiff from the performance of his part of the agreement, and from all readiness to perform it.

The defendant pleaded to this allegation of refusal by him (repeating the words of the declaration as to the lapse of time and the denial of any previous breach by the plaintiff), that he did not, before a reasonable time had elapsed for its performance by the plaintiff, or before any breach by him, refuse to perform his own part of the agreement. *Held* bad on demurrer.

The defendant also pleaded to the allegation of refusal (but without referring to the allegation as to time, or the denial of any breach by the plaintiff), that the plaintiff did not give or tender to the defendant a clear marketable title, and that the performance of those acts was never waived by the defendant. *Held*, on demurrer, bad. *Hibburt v. Warden* 192
statement of derivative title. *Vickery v. Marr* 202
See NUISANCE, 1.

POSTAGE.

See LARCENY, 1. *R. v. Wilson*

15

PRACTICE. 1. The decision of a Judge in Chambers, on a rule granted by the Court, but made returnable in Chambers, is subject to be reviewed by the Court.

The defendant was a contractor for building a bridge at A., where he had slept for three or four months; but he ordinarily lived in S. *Held*, that he was not resident at A. within the meaning of the fourth section of the District Courts Act. *Ex parte Baillie* 17

2. The plaintiffs having applied to a Judge for an order to restrain the defendant from pleading, the Judge granted the application subject to the payment of costs by the plaintiffs; the plaintiffs then wrote to the defendant that they should not act on the order as they intended to appeal from it to the Court; and they thereupon moved the Court to rescind the order, and their motion was dismissed with costs. The defendant having allowed his time for pleading to expire without pleading, the plaintiffs signed judgment and claimed the costs of the action. *Held* (*Hargrave, J., dissentiente*) that the plaintiffs had abandoned the order, and that therefore the judgment was regularly signed.

Where no principle or very large sum is involved, and the question is within the discretion of the Judge, the Court will not entertain a motion for reviewing the decision of the Judge as to costs, although such discretion has been wrongly exercised. *Fanning and another v. Simmons* 224

3. On a separate application to the Court, after an unsuccessful one to a Judge, new facts may be adduced; and the Judge's

- order may or may not be discharged or varied as incidental to the order of the Court. *O'Sullivan v. Aarons* 336
4. On a motion for a prohibition, affidavits of what occurred before the justices are not admissible to supplement the depositions; but they may be used for the purpose of showing merits. *Ex parte Monson* 256
 5. A party who has served a Judge's order on the other side with a notice that he intends to appeal, does not waive his right to move to rescind such order. *Ex parte Monson* 256
 6. A rule for an attachment for nonpayment of money, under a Judge's order, is only a rule *nisi*. *Ex parte Dooley* 343
 7. Notice to admit not having been given, costs of proving documents not allowed in the absence of the Judge's certificate under the 92nd section of the Common Law Procedure Act. *Levy v. Smith* 400
as to amendment *ad nisi prius*. *Morehead v. McIsaacs* 295
See PARTNERSHIP, 1.
- PROHIBITION, supplementary affidavits may not be used on motion for a statutory. *Ex parte Monson* 256
See MASTERS AND SERVANTS ACT, 1.
at common law. *Ex parte Baillie* 17
See DISTRICT COURT, 1.
See SMALL DEBTS ACT, 1. *Ex parte Charles* 108.
- PROMISE OF LEASE under the Crown Lands Occupation Act of 1861. *Macdonald v. Murray* 55
See TRESPASS, 2.
- PROMISSORY NOTE. 1. In an action by the indorsee of a promissory note against the maker, the first plea alleged that the note was made and given to S., in payment of the price of certain ale and stout, under an agreement by S. to sell to the defendant twenty hogsheads of "*Muir's new brew*" ale, and three hogsheads of stout, both guaranteed to be in good condition; that S. did not deliver any such ale or stout, but wholly neglected in any respect to perform his agreement; and that the note was indorsed to the plaintiff after maturity. The second plea varied from the first, only in the allegation that the indorsement by S. to the plaintiff was without value. At the trial the allegations of the pleas were proved; it appearing that the ale delivered after the promissory note was given was unsound, and not of the stated description, whereupon the defendant wrote to S., offering to send it to any place S. might name. The jury having found for the defendant on the first issue, the Court (*Hargrave, J., dissentiente*) refused to disturb their finding; because the note having been indorsed after maturity, the plaintiff stood in the shoes of S., his indorser, between whom and the defendant the absence of consideration or its failure was fatal to the instrument.
- The plaintiff at the trial having given no evidence of value, *Held* (*Hargrave, J., dissentiente*), that the circumstances raised such a degree of suspicion of fraud, affecting him and his title, as to render it incumbent in him to give that evidence, and that the defendant was entitled to the verdict on the second plea.
- On motion by plaintiff for judgment *non obstante veredicto*, *Held* (*Hargrave, J., dissentiente*), that the first plea was not bad, at least after verdict, for omitting to allege that the contract was rescinded, or that an offer was made on the breach to return the articles.
- Except in the case of accommodation bills or notes, he who takes a negotiable instrument after its maturity does so at his peril, and obtains by indorsement no better title or right than his immediate indorser had. *Ickerson v. Hayes* 158
2. The indorsement of a promissory note by one to whom it has not been transferred, will not make the indorser liable on his indorsement. *Williams v. Burley* 206

- PROOF OF CROWN JUDGMENT DEBT** under Insolvent Act.
In re Buckland's Estate 244
 See CROWN DEBT, 1.
- REAL ESTATE** sold under execution. *Maclean v. Dight* 95
 See SHERIFF, 1.
- REAL PROPERTY ACT.** 1. The declaration framed under the 23rd section of the Real Property Act, by a person who had entered a *caveat*, complained that the defendants put him unjustifiably to expense, by falsely asserting title to certain land, and endeavouring to procure a certificate of title thereto, notwithstanding the fact that he was seised and entitled as they well knew. Then, after stating the lodgment of his *caveat*, and that notice of this suit had been duly given, the declaration alleged that the plaintiff had instituted it in order to establish his title, and to obtain an order restraining the Registrar-General from further proceeding in the matter. *Held*, on demurrer, that the action was maintainable, and in its present form.
- The defendants pleaded, first, that the plaintiff never was, nor is he now, seised in fee simple in the land in question; secondly, that he was not now in possession of the said land. *Held* good, on demurrer.
- A third plea alleged that the defendants were the persons in whom the fee simple of the land was vested in possession at law or in equity, and were jointly seised of the fee simple in the land, wherefore they made application to the Registrar General, and did declare that the fee simple was so vested, and that they were jointly so seised, and did carry on proceedings for bringing the land under the provisions of the Real Property Act, and to obtain a grant of a certificate of title under the Act. *Held*, bad, on demurrer, for not stating whether their title was legal or equitable.
- A fourth plea traversing the defendants' knowledge of the plaintiff's title also *held* bad. *Stockdale v. Hamilton* and another 180
- RECEIVING STOLEN PROPERTY.** 1. Some rings and other property were stolen on the 11th October, 1864, from L.'s house at Tamworth; and on the 25th January, 1865, some of the stolen property was found in the possession of the prisoner. The prisoner was seen near L.'s house on the 11th October, 1864, and lodged in the neighbourhood for two months about that time. *Held*, that there was sufficient evidence to support the verdict of the jury, that the prisoner was guilty of receiving the said stolen property. *R. v. Arkon* 118
- REGISTRAR IN INSOLVENCY**, power of, to take evidence. *R. v. Enoch Hughes* 13
 See FRAUDULENT INSOLVENCY, 1.
- REPUDIATION OF CONTRACT** on ground of fraud. *Prince v. Nowlan* 310
 See COMPANY, 2.
- RESERVATION OF RIGHT OF WAY.**
 See WAY, 1. *Gibson v. M'George* 44
- RIGHT OF WAY.**
 See WAY, 1. *Gibson v. M'George* 44
- RIPARIAN PROPRIETORS**, relative rights of. *Pring v. Marina* 390
 See WATERCOURSE, 1.
- SALE** under bill of sale. *Humphery v. Roberts* 376
 See BILL OF SALE.
 by sheriff of right, title, and interest. *Maclean v. Dight* 95
 See SHERIFF, 1.
- SALE OF LIQUORS LICENSING ACT** (25 Vic., No. 14). 1. By section 3 of the Sale of Liquors Licensing Act, 25 Vic., No. 14, every person who shall sell in any house any liquor without a license, shall be liable to a penalty. By section 2, ever

term used in this Act importing the commission of any offence shall include and apply to the wilfully permitting or suffering the commission of a like offence by any other person, and shall render the person so wilfully permitting or suffering liable to the like penalty, as by any of the provisions hereof attend the actual commission of the like offence. A. was informed against for, and convicted of, permitting to be sold liquors in an unlicensed house, without alleging that he wilfully so permitted, &c. *Held* (*Hargrave, J., dissentiente*), that the conviction was bad; but the Court, on motion for a statutory prohibition, amended the conviction. *Ex parte Salmon* 397

SCAB IN SHEEP ACT OF 1863. 1. The 27th section of the Scab in Sheep Act of 1863 provides that no sheep shall be brought across the boundary from any adjoining colony, till the owner shall have obtained from some inspector a certificate, &c. The 28th section enacts that as soon as any sheep shall have passed any such boundary, the owner shall obtain from the inspector, "in addition to the certificate aforesaid," a permit. *Held* (*Faucett, J., dissentiente*), that the provisions of the 28th section were applicable to sheep illegally brought over the border without a certificate having been given, as well as to those in respect of which a certificate shall have been given. *Ex parte Green* 112

SCHOOL OF ARTS. 1. Declaration by the President, senior Vice-President, and Treasurer, for the time being, of the Sydney Mechanics' School of Arts, for that the defendants, who occupy the adjoining land, on which a steam flour mill is erected, have rendered the buildings of the Society useless for those purposes, and deprived the plaintiffs of the profit which they were accustomed to obtain, from hiring the room for lectures and similar public entertainments therein, by making loud noises with the machinery of the mill, to the annoyance and disturbance of the plaintiffs, and all persons permitted to resort to the said buildings.

Plea, by way of equitable defence, that the defendants' lessor—they being tenants of the premises for a term of years—erected the mill, and put up the machinery, with the consent of the then office-bearers of the Society, they, and also the plaintiffs, having notice that the working of that machinery would necessarily produce the noises complained of. *Held*, on demurrer, bad. *Stenhouse and another v. Hardie and another* 359

SERVANT, absconding by. *Ex parte Monson* 256
See MASTERS AND SERVANTS ACT, 1.

SERVICE OF JUDGE'S ORDER.
See PRACTICE, 5. *Ex parte Monson* 256

SETTLEMENT. 1. On motion to set aside a settlement under the 7th section of the Insolvent Act, it appeared that the settlement was executed within twelve months before the sequestration of his estate by the insolvent, who had a life interest in four houses—his eldest son having the reversion in fee. The father and son conveyed the houses to a trustee, to raise money on them for repairs, and subject thereto, on trust for the former's wife for her life, and then for two younger children till twenty-one, with remainder to the eldest son, the original reversioner. No money had been raised for repairs—and all the rent had been paid by the trustee to the wife. *Held*, that the settlement was not voluntary. *Ex parte Giblin and another* 260

SHAREHOLDER, repudiation of liability by, in consequence of fraud in agent of company. *Prince v. Nowlan* 310
See COMPANY, 2.
See COMPANY, 1. *Prince v. Nowlan* 304

SHERIFF. 1. The first count of the declaration stated that A., sheriff of the colony, &c., agreed to sell to the defendant, and that the latter agreed to buy from him, "the right, title, and interest" of one H., "heir-at-law," and of J. and G. C., "devisees" of G. H., deceased, to and in certain lands described, at a price named. Averment of fulfilment of all conditions precedent. Breach, nonpayment of balance.

The second count was for not tendering or preparing a conveyance of the premises, for execution by the plaintiff. Plea, setting out the proceedings in an action by one C. against the same heir and devisees, on certain debts due by the testator in his life time; in which action these defendants allowed judgment to go against them by default; whereupon a writ of *feri facias* issued to the plaintiff as sheriff, commanding him to levy the amount of that judgment on the lands and goods of the heir and devisees. The plea then alleged that the sale was under the writ, and that the heir never had any title to or interest in the land in question, and that the devisees held it in trust only, without any beneficial interest in themselves whatever.

Replication, setting out the testator's will, by which it appeared that he left all his property to the devisees named, the land in question being a portion, in trust for his wife and children, alleged that the testator died seised thereof. *Held*, on demurrer, that the plaintiff was entitled to judgment.

Every devise is void as against a testator's unpaid creditors of every degree, and land of which the testator died seised remains vested in the heir for their benefit. *Maclean v. Dight* 95

SMALL DEBTS ACT. 1. A. was summoned to the K. Small Debts Court, by the municipality of K., for £4 10s. 4d., being the rate due by A. for the half-year ending July, 1865. A. had previously been served with a notice to pay £15, for a rate due by him to the same municipality for a preceding year. But the latter rate was formally abandoned by a resolution of the Council, and entry made in the minute-book that it was "cancelled and relinquished." At the trial the chairman stated that the municipality had no claim against the defendant, except for the rate of £4 10s. 4d. then sued for. *Held*, on motion for a prohibition, that the Court of Petty Sessions had jurisdiction, and that there had been no splitting of the cause of action for the purpose of bringing the same within the jurisdiction of the Small Debts Court.

Ex parte Charles 108

SPLITTING OF CAUSES OF ACTION.

See **SMALL DEBTS ACT**, 1. *Ex parte Charles* 108

TITLE, claim of, ousts the summary jurisdiction of justices. *Ex parte Desmond* 387

See **JUSTICES**, 2.

TOLL.

See **WAGGA WAGGA BRIDGE COMPANY**, 1. *Ex parte McKay* 236

TRESPASS. 1. Trespass for breaking and entering a certain station of the plaintiff, called A. Plea, on equitable grounds, after alleging that before, &c., there had been a dispute between the plaintiff and defendant as to the boundaries of their respective runs, A. and B., set forth an arbitration and award in pursuance of the provisions of the Crown Lands Occupation Act of 1861. It then averred that, by the award, it was directed that a certain line should be struck and measured, and that the defendant was entitled to a lease of the country to the east, and the plaintiff to a lease of the country to the west of the said line. Averment, that the land trespassed

upon lay to the east of the said line. *Held*, on demurrer, bad. *Rusden v. Bagnall* 40

2. In an action of trespass for seizing and impounding cattle *damage feasant*, one question being, whether the land where the seizure was made legally formed part of the defendant's run called M., or was properly part of an adjoining run called B., of which a lease had been promised to the plaintiff; and a second question being, whether the defendant had received a similar promise within section 28 of the Crown Lands Occupation Act of 1891, applicable to the particular area; it appeared that the run called M. was occupied by the defendant in and before 1847, under a Crown license, and that he in 1848 applied for a lease of the property, describing it by boundaries which included the tract in dispute but representing the entire extent, which was actually above 37,000 acres, to be 32,000 acres; and that this application was notified in the *Gazette*, favourably reported on in 1849 to the Chief Commissioner, and from that date up to 1863, the estimated rent on 32,000 acres had been paid. It appeared also that in September, 1857, the plaintiff tendered as for a new run, for 16,000 acres, of which the disputed tract formed a part under the name of B. The local Commissioner having reported favourably, the plaintiff's tender was accepted, and a lease promised to the plaintiff by letter under the Chief Commissioner's hand. The jury having found that there was no promise of a lease of the disputed area to the defendant, the Court, on motion for a new trial, refused to disturb the verdict. The promise to the plaintiff gave a title to the area in question, notwithstanding the defendant's possession of the same, unless the defendant could support it by adequate evidence of a prior promise embracing the same land. *Macdonald v. Murray* 55
 See *TROVER*, 1. *Lane v. Taylor* 84
 See *WAY*, 1. *Gibson v. M'George* 44

TROVER. 1. A joint action will lie by partners whose goods have been sold and removed under an execution against one of them, confirming *Smith v. Ogg* (3 Sup. Ct. R., C. L. 6).

To a count in trover by members of a partnership, one of the members pleaded that the conversion complained of was a seizure and sale of the goods of the firm by the other defendant, under a writ of *fi. fa.*, against one of the partners. Replication, setting up negligence in the sale, whereby the goods realised much less than their value. *Held* bad on demurrer.

The plea also was held bad as not confessing the conversion complained of.

To a count in trespass, for breaking and entering the close of the partners, one of the defendants pleaded the same judgment and execution, alleging that the other defendant, in pursuance of the writ of *fi. fa.*, entered on the premises to execute the same, and there seized the goods of one of the partners. Replication, setting up negligence in the sale. *Held* bad on demurrer, as negligence in the sale cannot make the entry unlawful.

The plea was also held bad as not confessing the entry alleged. *Lane v. Taylor* 84

TRUSTEE.

See *SCHOOL OF ARTS*, 1. *Stenhouse v. Hardie* 359

UNCERTIFICATED INSOLVENT, promise by, to pay debt provable against his estate, creates a new debt, recoverable by action. *Müller v. Keogh* 210

VAGRANT ACT.

See *FALSE IMPRISONMENT*, 1. *Armstrong v. Fuller* 269

VARIANCE.

See CONTRACT, 1. *Brown v. Waratah Coal Company* 238

See PARTNERSHIP, 1. *Morehead v. McIsaacs* 295

VERDICT.

See FALSE PRETENCES, 4. *R. v. Shadforth* 337

VOLUNTARY SETTLEMENT.

See SETTLEMENT, 1. *Ex parte Giblin* 258

WAGES, advance of, under Masters and Servants Act. *Ex parte Monson* 256

See MASTERS AND SERVANTS ACT, 1.

WAGGA WAGGA BRIDGE COMPANY. 1. The sixth section of the Wagga Wagga Bridge Company's Act empowered the company to receive the tolls for the use thereof. The 21st section provides that "if any person pass through any toll-gate at or upon the said bridge without paying the legal toll to which he is liable, or shall fraudulently evade or do any act whatever in order or with intent to evade the payment of such toll," he shall be liable to a penalty. The 26th section enacts that the company shall have the absolute and exclusive right of ferry over the river Murrumbidgee for the full and clear distance of two miles on each side of the said bridge, up and down the said river, and every person establishing for hire or profit any ferry shall be liable to a penalty. *Held*, that the company is not entitled to receive toll in respect of animals crossing the river within two miles of their bridge, but not over it, nor is such crossing the river an evasion of payment of the toll under the 21st section. *Ex parte McKay* 236

WATERCOURSE. 1. The erection of a dam by a riparian owner across a running stream cannot be lawful if it obstruct for one moment the flow of the entire stream to the other lands below.

Action for erecting a dam upon a stream, and thereby obstructing the flow of the water, to the injury of the plaintiff, who occupies land lower down the stream. Plea—that the said stream flowed through the defendant's run, and the defendant was entitled to the reasonable use of the water thereof for himself, servants, etc., and for the beneficial use of his run; and that for such reasonable use, &c., he erected the dam, and thereby interrupted and obstructed the flow of the water of the stream a little and not more than was necessary for the purposes aforesaid, and that the interruption and obstruction were not nor are they a continuous interruption and obstruction of the water, but were for a short time only, and until the water rose to the level of the said dam, leaving during such time sufficient water in the stream for the plaintiff's use; and that thereupon the stream flowed and continued to flow into and upon the plaintiff's land. Averment, that the quantities of water so interrupted and obstructed were and are very small and inappreciable quantities, and not more or greater than were and are necessary for the defendant's purposes, and the small and inappreciable quantities were and are not required, and had at no time theretofore been appropriated, by the plaintiff, and the said interruptions and obstructions did not deprive the plaintiff of the use of the stream, nor have they occasioned any actual or perceptible damage to the plaintiff. *Held*, on demurrer, *bad*. *Pring v. Marina* 390
See PLEADING, 1. *Municipality of Waterloo v. Hinchcliffe* 273

WAY. 1. In an action for trespasses to land, which the defendant justified by reason of a right of way of necessity, it appeared that in and before 1835 the defendant occupied a certain farm, bounded on three sides by granted lands, and on the fourth side by waste lands of the Crown, which were granted to the

plaintiff in 1835. The defendant's occupation of the said farm continued up to 1839, when he obtained a grant of the same. *Held*, that when the Crown granted the waste land to the plaintiff, it reserved to itself a way of necessity over the same to and from the defendant's farm, and that the same right passed by the grant of 1839 to the defendant.

Semble, that even although the Crown had not, before 1835, actually granted all the lands adjoining the defendant's farm, this implied reservation of a right of way of necessity to the defendant's farm equally existed, as otherwise neither the Crown nor the defendant could reach the latter's farm without violating the rights of his neighbours.

Gibson v. M'George

44

WIFE, meaning of word in devise. *Brown v. Brown*

216

See WILL, 1.

WILFULLY PERMITTING sale of Liquors under Sale of Liquors Licensing Act. *Ex parte Salmon*

397

See SALE OF LIQUORS LICENSING ACT, 1.

WILL. 1. The testator was at the time of his death living with *Jane B.* as his wife, the ceremony of marriage having passed between them. But in reality his wife was one *Hannah Jane B.* He had not, however, lived with or recognised the latter for some years; and she on her part believing, for certain reasons, that her marriage with the testator was invalid, had been married to and living with one *C.* By his will the testator first devised certain lands to "my wife, *Jane B.*, her heirs, &c.;" and then there being no intervening reference to any wife, he said, "as to all the residue, &c., I devise the same to my wife, and hereby appoint her executrix of this my will." *Held*, that *Jane B.* took under this devise, and was entitled to probate as executrix. *Brown v. Brown*

216

WOOL (LIEN ON).

See LIEN ON WOOL.

CASES IN EQUITY.

ACQUIESCENCE. There can be no acquiescence where all parties are ignorant of their rights. *Norton v. Hughes* 23

ADMINISTRATOR. An administrator, with will annexed of a testator, who by his will charged all his real and personal estate with payment of an annuity, and subject to that gave all his property, real and personal, to his children, in equal shares, had advanced moneys to some of the children without having invested funds to meet the annuity, and it was subsequently found that the personalty was insufficient for that purpose.

Held (Stephen, C.J., *dissentiente*), that the administrator, under the circumstances of the case, was entitled to his costs of suit out of the estate. *O'Ferrall and others v. The Attorney General and others* 101

ADVICE OF COURT under Act 26 Vic., No. 12. A testator, after directing the payment of his debts by his executors out of his estate generally, made a specific devise of certain real property to an infant, and devised and bequeathed the residue of his realty and personalty to his executors and trustees on certain trusts, giving them also power to sell his real estate when they should think advisable, and before sale to demise the whole or any part thereof. Previous to his death the testator deposited the title deeds as well as the specific devise as of lands included in the residue, as an equitable mortgage to secure a debt. On the trustees seeking the advice of the Court as to the mode of dealing with testator's property, for the payment of this debt. *Held*, that the specific devise, as between itself and the residuary devise, was charged with its proportionate share of the debt, and that in case the personal estate was insufficient for the payment of the testator's debts, the deficiency should be borne by all the property subject to the mortgage, as well that specifically devised as those included in the residue, in proportion to their respective values. Trustees *advised* that such values might be ascertained by respectable valuers, and the deficiency raised by mortgage or otherwise. *Sullivan's Will and Trust Property Act, 1862* 20

AUCTIONEER. An auctioneer cannot appoint an agent to bid for an intending purchaser.

R. and W. were auctioneers and also mortgagees of a station belonging to H. B. and R. B. On a sale of the station by R. and W., they nominated an agent to bid for M., one of their constituents, who became the purchaser. *Held*, that the purchase by M. through the agent so appointed was void as against H. and R. B. *Brooks v. Richardson* 3

BIDDINGS, OPENING OF

SEE SALE BY ORDER OF COURT.

CONSTRUCTION OF WORDS. 1. In will. Devise to the "children" of, *held* to give them an estate in fee. *Norton v. Hughes* 23

2. In will. Bequest or money to wife "for her use and benefit," and for the purpose of maintaining testator's children.

SEE TRUST, BREACH OF

3. In Master's Report. Money of plaintiffs in defendant's hands, which was "dedicated," or ought to have been dedicated to a certain purpose.
See PARTNERSHIP ACCOUNT.

COSTS.

See ADMINISTRATOR.

CO-TRUSTEES.

See LIMITATIONS, STATUTE OF

DELAY in applying to the Court a bar to relief. *Berry v. Stirling* 73

See SHAREHOLDERS.

DEVASTAVIT.

See TRUST, BREACH OF

INJUNCTION.

See MORTGAGE.

LIMITATIONS, STATUTE OF. Statute of Limitations no defence to bill by trustees and *cestui que trusts* against co-trustee, where the trust is express.

S. T., by his will made in 1824, devised two farms called C. and R. to H. M. *in tail*, and by a subsequent devise gave certain lands specifically mentioned, and "all and singular other his messuages, farms, lands, and hereditaments of every description, *not thereinbefore disposed of* by him, and wheresoever lying and being, and *whether in possession, remainder, or expectancy*, to E. T. (his heir at law) *in tail*. By a codicil made in 1834, S. T. expressly revoked the devise in tail to E. T., and devised by name the same lands given by his will to E. T.," and all other his real estates *not otherwise disposed of* by his will or this codicil," to trustees *in fee* on certain trusts. By another codicil made in 1836, S. T. partially revoked the last mentioned trusts, substituting a trust for E. T. during life, and after his decease to the heirs of his body, and in case of the said E. T.'s death without issue, he devised "the same real estate to all the children of J. T., J. T. H., and M. F. H., who should be then living as tenants in common," and directed his trustees, upon such event, to convey the said estate unto and to the use of each of the said children *accordingly*.

S. T., the testator, died in February, 1838, having survived H. M., who left no issue. In March, 1838, E. T., the testator's heir-at-law—to whom it was supposed by all parties the farms C. and R. had descended, by lapse of the devise, to H. M.—conveyed them for value to J. T. H., one of the trustees, who then entered into possession of the said farms and 175 acres adjoining, also now claimed as part of the residuary estate; and in 1844 all these properties were settled on E. H., the wife of J. T. H., to her separate use. E. T. died in November 1838, without issue. J. T. H. died in 1851. In 1854 his widow, E. H., became one of the trustees of S. T.'s will. From 1838, J. T. H. and E. H. held possession of and dealt with the two farms, C. and R., and the 175 acres as their own—no objection to their possession being made by any of the trustees or *cestui que trusts*, until sometime after E. H. became trustee. The original bill was filed in 1862.

In suit by trustees and *cestui que trusts* against E. H., *Held* (*Hargrave, J., dissentiente*), that the farms C. and R., as well as the 175 acres, were part of the residuary estate of S. T., and were held by E. H. and co-trustees upon an *express* trust, within the meaning of the 25th section of the Statute of Limitations, and that the *cestui que trusts* were not barred from claiming them by the lapse of twenty years.

Held also (*Hargrave, J., dissentiente*) that by the devise in S. T.'s codicil of 1836, to the "children" of, &c., they took an estate in fee. *Norton v. Hughes* 23

MORTGAGE. The purchaser of an equity of redemption, having notice of any lease or occupation of the mortgaged premises,

is bound by the equities existing between the mortgagor and the tenants or occupiers; and if the mortgagee himself purchase the equity of redemption, without the intervention of a trustee, he cannot set up his mortgage against such equities, but takes the estate precisely as any other purchaser. *E.* having in 1863 mortgaged certain land to *L.*, with proviso for redemption in 1868, granted a lease, in 1864, of part of the property to *B.* for thirty years. In 1865 *L.* purchased the equity of redemption, and at the same time gave a lease of the whole property to *S.* for three years, both *L. & S.* having at the time notice of *B.*'s lease. *Held*, that the lease to *S.* was subject to *B.*'s lease, and that *B.* was entitled to an injunction restraining *S.* from prosecuting an action of ejectment against him, and to have his lease confirmed by *L. & S.*

MORTGAGE, EQUITABLE.

See ADVICE OF COURT.

PARTIES. 1. *H. B.* and *R. B.* being partners in a station property, the latter assigned his estate to trustees for the benefit of his creditors; but, subsequently, his estate was re-assigned to him. The station was sold by the mortgagees while *H. B.*'s estate was still in the hands of the trustees, who made no objection to the sale.

Held, that the re-assignment gave *H. B.* a right to join with *R. B.* in a suit impeaching the sale. *Brooks v. Richardson* 3

2. Suit defective for misjoinder and want of *Berry v. Stirling* 73
PARTNERSHIP ACCOUNTS. The master in taking a partnership account of a station property purchased by the plaintiff and defendant jointly, gave credit to the plaintiff for £500, half of a sum of £1000 paid by the defendant on account of the purchase money—finding by his report “that there was cash of plaintiffs to the amount of £500 in the defendant's hands at the date of the purchase, and which was dedicated, or then ought to have been dedicated, to that purpose. There was also a separate account between the parties.

On exceptions taken to this finding, *Held* (*Hargrave, J., dissentiente*), that the question substantially, was whether or not the master was right in giving credit to the plaintiff under the circumstances for the £500, on the partnership account, specifically, and exceptions overruled. *Gorman v. Jones* 92

RECEIVER. A receiver or manager, with a salary fixed at a certain sum per annum, who has been discharged within the year, and before he has actually entered upon his duties, or received any of the income, is not entitled to a proportionate part of his salary for the time during which he held the appointment. *Frost v. Healy* 1

SALE under order of Court. An order to open biddings will not be made until after the master has made his report as to the sale. *Wyse v. Heggarty* 84

SALE VOID.

See AUCTIONEER.

SHAREHOLDERS. Shareholders who have obtained releases from further liability, excluded from participation in surplus.

The Bank of Australia being under heavy liabilities, which its directors intended to pay off by repeated calls on the shareholders—enforcing such calls by the aid of a *sci. fa.*, on a judgment obtained by the Bank of Australasia—the plaintiffs after paying two calls, compounded, by an immediate payment, for releases from all future liabilities as shareholders. The releases were given, but no transfer of the shares was made. After the releases, the liabilities of the bank were paid off, and a surplus remained, which, by a resolution of the shareholders passed in March 1851, was distributed among such shareholders as had paid all the calls, and who had not received

releases. In June, 1850, the plaintiffs filed their bill, claiming a share in the surplus.

Held, that the releases obtained by the plaintiffs, as they exonerated them from further liability, also excluded them from participation in the surplus distributed among the shareholders who had paid their calls, but not received releases.

Held also, that the plaintiffs were precluded from obtaining the relief sought, by their delay in applying to the Court.

Held, lastly, that the suit was objectionable for misjoinder and want of parties—the directors alone being made parties defendants. *Berry v. Stirling* 73

STATUTE OF LIMITATIONS no defence to bill by trustees and *cestui que trusts* against co-trustee, where trusts are express. *Norton v. Hughes* 23

TRUST, BREACH OF. W.S., by his will, declared “my will and meaning is, that my wife shall, during the term of her natural life, be and remain in possession of all my household goods, &c. ; and that the remaining personal property—such as money—*shall be for her use and benefit*, and for the purpose of maintaining my eight children, so far as the same will go.” He also devised his real property upon certain trusts to his wife, whom he appointed his executrix and trustee and guardian of his children. His widow entered on the trusts, and afterwards intermarried with T.B.G. without settlement. A sum of money, the produce of W.S.’s estate, and which, since his death, stood in the bank in the name of his widow, was, after her second marriage, drawn out by her and handed to her husband, T.B.G., who applied it to his own use, without giving any security for its repayment. The children had always been properly maintained by Mrs. G. since the testator’s death.

Held, that the said sum was part of the testator’s personal assets, and subject to the trusts of his will, and that T.B.G. and wife—the former having constructive notice of these trusts—had, in respect thereof, committed a *devastavit* and breach of trust respectively, and T.B.G. was decreed to refund the money—allowance being made for any outlay by him out of that particular fund in the improvement of the trust property. *Shepherd v. Goodey* 84

TRUSTEES.

See ADVICE OF COURT.

TRUSTEES AND CESTUI QUE TRUST.

See STATUTE OF LIMITATIONS.

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